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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. This Court has held that the test to determine if a person is "in custody" to require warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), is an objective test (i.e., whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest). *Thompson v. Keohane,* 516 U.S. 99, 112 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). The question presented is:

Whether, in applying the objective test for a "custody" determination under *Miranda*, a court must consider the age and experience of a person if he or she is a juvenile.

2. Under 28 U.S.C. § 2254(d), a federal court may not grant habeas corpus relief to a state prisoner on a claim adjudicated on its merits in State court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." In *Williams v. Taylor*, 529 U.S. 362, 408 (2000), this Court explicitly left open how "extension of legal principle" cases should be treated under § 2254(d)(1). The question presented is:

Whether a state court adjudication can be deemed an "objectively unreasonable" application of clearly established Supreme Court precedent, for purposes of § 2254(d), because it declines to "extend" the rule of a Supreme Court precedent to a new context.

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## IN THE SUPREME COURT OF THE UNITED STATES

No.

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MICHAEL YARBOROUGH, Warden of California State Prison—Los Angeles County, *Petitioner,*

v.

MICHAEL ALVARADO, *Respondent.*

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## PETITION FOR WRIT OF CERTIORARI

Michael Yarborough, Warden of California State Prison—Los Angeles County, at Lancaster, California (hereafter the Warden), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals is reported as *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002), *amended* (2003), and is reproduced in pages A1 to A30 of the Appendix (App.) to this petition. The order of the District Court denying habeas corpus relief is unreported. App. B1-B10. The opinion of the California Court of Appeal is certified for partial publication and reported as *People v. Soto*, 74 Cal. App. 4th 1099, 88 Cal. Rptr. 2d 688 (1999). App. C1-C26.

## STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals granting habeas corpus relief was amended and entered on February 11, 2003. The Court of Appeals denied the Warden's petition for rehearing with suggestion for rehearing en banc on February 11, 2003. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . . .

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

## STATEMENT OF THE CASE

After midnight on September 22, 1995, respondent Michael Alvarado, Paul Soto, and others went to a shopping mall in Santa Fe Springs, California. They saw a truck driven by Francisco Castaneda. One person in the group approached Mr. Castaneda and obtained one dollar from him. In Alvarado's



presence, Soto said, "Let's jack," meaning to steal the truck. Soto and Alvarado approached Mr. Castaneda's truck. Soto walked to the driver's side of the truck, while Alvarado walked towards the passenger door of the truck. A gunshot and a scream followed. Mr. Castaneda was found dead from a bullet wound.

Approximately one month after the crimes, Los Angeles County Sheriff's Detective Cheryl Comstock left word at Alvarado's house and with his mother at her workplace that the Sheriff's Department needed to speak with Alvarado. Alvarado's mother told Detective Comstock that Alvarado's father would bring Alvarado to the Sheriff's station so he could be interviewed. Both parents went with Alvarado to the Sheriff's station and gave their permission for Detective Comstock to interview him. Alvarado was seventeen years old at the time of the interview. His parents were apparently refused permission to be present during the interview.

The interview, conducted exclusively by Detective Comstock, lasted approximately two hours, from 12:30 p.m. to 2:30 p.m. She never told Alvarado that he was under arrest and did not give him *Miranda* warnings. Near the end of the interview, Detective Comstock indicated that Alvarado would be allowed to return home after the interview.

Detective Comstock expressed disbelief when Alvarado's initial version of events omitted any mention of the crimes. Alvarado repeated his statement that he had seen no shooting. Detective Comstock informed Alvarado that she had witnesses who said "quite the opposite," and that she had "three notebooks full of notes." She urged him to tell the truth. She never told him that he would have to remain in the Sheriff's station until he told the truth.

Eventually, Alvarado gave further details of the crime, including his role in hiding the gun after the murder. He identified Soto as the shooter. Near the end of the interview, Alvarado was offered the use of a telephone to make a call, but he declined. Shortly thereafter, he was also offered an

opportunity to take a bathroom break or water break, which he also declined. He returned home after the interview.

In December 1995, Detective Comstock told Alvarado's parents that a warrant had been issued for Alvarado's arrest and Alvarado turned himself in at the Sheriff's station. He was charged with Mr. Castaneda's murder and attempted robbery.

Prior to trial, Alvarado moved to suppress evidence of his statements to Detective Comstock. The focus of his argument was the failure of the detective to interview him in the presence of his parents. The prosecution filed an opposition to the motion, arguing that *Miranda* advisements were not required because Alvarado was not in custody during the interview. Following a hearing on the motion, the trial court denied Alvarado's motion to suppress his statements. His statements during the interview were admitted into evidence at trial.

Alvarado was convicted of murder and attempted robbery and was sentenced to state prison for an indeterminate term of fifteen years to life. He appealed his convictions. The California Court of Appeal rejected his claim that his statements were erroneously admitted by the trial court in violation of *Miranda*. App. C11-C17. After setting forth the circumstances surrounding Alvarado's interview (App. C12-C17), the California Court of Appeal stated, "We are satisfied that a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave." App. C17. The court reasoned that Alvarado was not told he could not leave until he told the truth, and was not subjected to intense and aggressive tactics. The court noted that although Detective Comstock made it clear to Alvarado that she disbelieved his early, exculpatory, version of the events on the night of the murder, she did not fabricate evidence or subject him to intense pressure. The court concluded that Alvarado was not in custody during his interview with Detective Comstock, and therefore no *Miranda* warnings were required. App. C17. Alvarado's petition for review in the California Supreme Court was denied.



Alvarado filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Central District of California. The petition claimed as a ground for relief that his statements were obtained in violation of *Miranda*. The magistrate judge issued a report recommending that the petition be denied with prejudice. The magistrate judge found that Alvarado was not in custody and that his statements were properly admitted. The magistrate judge concluded that the California court's rejection of Alvarado's claim therefore was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. App. B1-B8. The District Court filed an order adopting the findings, conclusions, and recommendations of the magistrate judge, and entered a judgment denying the petition and dismissing it with prejudice. App. B9-B10.

Alvarado appealed. In a published decision, the Ninth Circuit held that a defendant's juvenile status alters the "in custody" determination for *Miranda* purposes. App. A1-A30. The Ninth Circuit stated that Supreme Court cases have held that a juvenile is more susceptible to police coercion during a custodial interrogation than would be a similarly-situated adult. App. A17-A18. The court reasoned that, because the age and circumstances of a juvenile defendant are relevant factors in determining whether a confession or a waiver of constitutional rights are voluntarily given, there was "no principled reason why similar safeguards . . . would not apply equally to an 'in custody' determination." App. A18-A19. The Ninth Circuit held that because the state court failed to address how Alvarado's juvenile status affected the "in custody" determination, the state court unreasonably failed to "extend" a clearly established legal principle to a new context. App. A22-A26. The court further held that, considering the additional factors of Alvarado's age, his lack of prior arrest history, his inexperience with law enforcement officers, the parental involvement to arrange for his interview with the Sheriff's Department, and the Sheriff's Department's refusal to let his parents attend the interview in the objective

determination of custodial status, Alvarado was "in custody." App. A20, A25-A26. The Ninth Circuit also held that the improper admission of the incriminating statements by the state court had a substantial and injurious effect on the subsequent jury verdict. The Court of Appeals reversed the District Court's denial of the habeas petition and remanded the case for the district court to issue a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state began trial proceedings within 120 days of the issuance of the mandate. App. A30.

The Warden's petition for rehearing with suggestion for rehearing en banc in the United States Court of Appeals for the Ninth Circuit was denied on February 11, 2003. App. A1, A5.

On February 12, 2003, the Warden filed a motion to stay the issuance of the mandate in the Ninth Circuit. The Ninth Circuit has not yet ruled upon the motion, and the mandate has not issued.

## REASONS FOR GRANTING THE WRIT

In this case, the Ninth Circuit made the controversial judgment that a particular person's age and "juvenile status," factors logically relevant in determining whether an accused's will had been overborne by coercion, are somehow also vital considerations in objectively determining whether alleged restraints upon the person's freedom of movement approximate that of a full-blown arrest. In doing so, the Ninth Circuit recognized that it was extending a rule from this Court's "voluntariness" precedents into the different context of "custody." And, consequently, the Ninth Circuit also resolved the controversial question of whether, under the restrictions on habeas corpus relief imposed by § 2254(d), a state court's decision may be deemed an "unreasonable application" of "clearly established law" under this Court's precedents if it does not anticipate such an extension of this Court's precedents into a novel setting. There is a split in the circuits on these points. And the Ninth Circuit's extension of precedent will



exert a significant impact not only upon the state courts, but also upon law enforcement officers, who will now be faced with the prospect that identical police conduct will not be deemed "custody" for some individuals, but will be for others.

### I.

**The Ninth Circuit has decided an important and recurring issue regarding "custody" for *Miranda* purposes that conflicts with decisions of this Court, has caused a split among the circuit courts of appeals, and has placed a significant burden on law enforcement.**

For the first time by a circuit court of appeals, the Ninth Circuit held that, in determining whether a juvenile was in custody for *Miranda* purposes, a court must consider the person's "juvenile status" (i.e., the juvenile's age and experience). App. A18-A20, A23-A24. The decision below creates a new standard for an "in custody" determination for the purposes of *Miranda* when the person questioned is a juvenile, in that it conflicts with this Court's decision in *Berkemer v. McCarty*, 468 U.S. 420 (1984), and has caused a split among the circuit courts of appeals. It also has a significant impact upon law enforcement.

1. *Miranda* warnings are required only when a person interviewed by the police is "in custody." *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Miranda*, 384 U.S. at 444. In determining whether a person was "in custody" at a particular time, "the only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. at 442. Although the circumstances of each case must certainly influence a determination of whether a person is "in custody" for *Miranda* purposes, the *ultimate* inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

This Court has held that the reasonable person test is an objective test which does not "place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" *Berkemer*, 468 U.S. at 442, n.35 (quoting *People v. P.*, 21 N.Y.2d 1, 9-10, 233 N.E.2d 255, 260 (1967)). Considering a juvenile's age and experience is contrary to the objective reasonable person test for indicia of arrest set forth by this Court's cases. Age and experience are individual characteristics and do not directly reflect the degree of restraint on freedom of movement. Indeed, in *People v. P.*, 233 N.E.2d 255, which has been quoted with approval by this Court (*see Berkemer*, 468 U.S. at 442 n.35), the court applied a reasonable person test to a sixteen-year-old defendant, *not* a modified test. *People v. P.*, 233 N.E.2d at 256, 260-61.

The Ninth Circuit arrived at its contrary conclusion by failing to recognize the fundamental difference between an "in custody" determination for *Miranda* purposes and a determination of the voluntariness of a confession or a waiver of constitutional rights. *See* App. A18-A19. Unlike in the objective reasonable person test for an "in custody" determination, age is logically relevant in determining the voluntariness of a confession or a waiver of constitutional rights. *See Stein v. New York*, 346 U.S. 156, 185-86 (1953) (characteristics of the accused relevant to determining the voluntariness of a confession include the accused's *age*, sophistication, prior experience with the criminal justice system, and emotional state), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979) (question of voluntary waiver of constitutional rights is determined on the "'particular facts and circumstances of the case, including the background, experience, and conduct of the accused.'"). Age is a relevant factor for determining the voluntariness of a confession or a waiver of constitutional rights because both inquiries analyze the accused's state of mind, i.e., whether the accused voluntarily gave the confession or voluntarily waived constitutional rights.



An "in custody" determination for *Miranda* purposes, however, is different from a determination of whether a confession or waiver of constitutional rights was voluntarily given. "Juvenile status" is not relevant to an "in custody" determination, because the *ultimate* inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. at 1125. The purpose of an "in custody" determination is to gauge whether there is an indicia of custody associated with formal arrest to require law enforcement officers to give *Miranda* warnings. Consequently, the person's state of mind has no substantial relevance to the indicia of custody. The Ninth Circuit failed to recognize this fundamental difference, and in essence has converted the "in custody" determination for *Miranda* purposes into the same test for determining whether a confession is voluntary.

2. Moreover, the decision below directly conflicts with the decision of at least one other circuit, and is at least inconsistent with decisions of two other circuits. In *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998), the defendant, a thirteen-year-old juvenile, argued on appeal that "[a] child with [E.L.'s] characteristics would reasonably feel unable to leave or to request that officers leave under the circumstances in which [E.L.] found himself." The Tenth Circuit held that in evaluating whether the defendant was in custody, only the restraint imposed by the officers was a relevant consideration. The Tenth Circuit held that the defendant's particular traits were irrelevant under the objective standard unless the officers were aware of the particular traits *and* those traits influenced the actions of the officers. *Id.* at 1247-48. The Tenth Circuit stated:

> Finally, to the extent that E.L.'s brief can be read as inviting this court to reach out to create a dual track for "in custody" determinations by making such determinations objective when the suspect is an adult but subjective when the suspect is a child, we decline

> the invitation. Not only is it unwise to place such a burden on law enforcement, but such an approach is directly contrary to the approach adopted by the Supreme Court.

*Erving L.*, 147 F.3d at 1248 (citing *Berkemer*, 468 U.S. at 442 n.35).[1/]

The decision below is also at least inconsistent with decisions of the Sixth and Eighth Circuits. In *United States v. Macklin*, 900 F.2d 948, 949-51 (6th Cir. 1990), the Sixth Circuit held that a reasonable person test, rather than a subjective test, is appropriate to determine whether a mildly retarded suspect was in custody. In so holding, the Sixth Circuit cited to this Court's opinion in *Berkemer*, 468 U.S. at 442 n.35. *Macklin*, 900 F.2d at 951. In *United States v. J.H.H.*, 22 F.3d 821, 831 (8th Cir. 1994), the fourteen-year-old defendant argued that his police interview was a custodial interrogation and his statement was coerced by threats. The Eighth Circuit's detailed analysis rejecting the claim does not address or analyze the "juvenile's status," (i.e., age and experience). *See id.*

3. Resolution of this conflict among the circuits is vital because law enforcement agencies are presently subject to inconsistent mandates as to when *Miranda* warnings must be given to juveniles. This issue will necessarily arise whenever juveniles are questioned by law enforcement officers. The

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1. The Ninth Circuit asserted that *Erving L.* modified the objective standard to account for the defendant's status, based on language in *Erving L.* "Given these facts, *a reasonable juvenile*, in E.L.'s position. . ." App. A14 (emphasis in original). *Erving L.* does contain the words "reasonable juvenile" in one sentence. But, read in its entirety, *Erving L.* rejects a modification of the reasonable person test. Indeed, the Tenth Circuit concludes the "in custody" analysis with a clear indication that it used a reasonable person test: "Because a reasonable person in E.L.'s position would not have believed that he was subjected to the functional equivalent of formal arrest, this court reverses the district court's conclusion that E.L. was in custody for *Miranda* purposes." *Erving L.*, 147 F.3d at 1248.



Ninth Circuit's decision below introduces an element of uncertainty because not all similarly-situated persons will be considered to be in custody. It is, of course, a goal of this Court's jurisprudence on *Miranda* custody to provide effective guidance to law enforcement. *See Thompson v. Keohane*, 516 U.S. 99, 115 (1995). Moreover, the practical consequence of the Ninth Circuit's decision is that law enforcement officers will not be able to determine whether *Miranda* rights should be given to a juvenile unless they can divine the age and experience of the juvenile. This is an unwarranted burden to place upon law enforcement officers. *See Berkemer*, 468 U.S. at 442 n.35.

## II.

**The circuit Courts of Appeals are divided over whether a State court adjudication can be deemed "objectively unreasonable" for purposes of 28 U.S.C. § 2254, where the State court declines to "extend" the rule of a Supreme Court precedent to a new context.**

Under 28 U.S.C. § 2254(d), a federal court may not grant habeas corpus relief to a state prisoner on a claim adjudicated on its merits in state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." In *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000), this Court stated:

> The Fourth Circuit also held in *Green* [*v. French*, 143 F.3d 865 (4th Cir. 1998)] that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to extend) a legal principle to a new context where it should apply should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. *See* 143 F.3d at 869-70. Although that holding may perhaps be correct, the classification does have some

> problems of precision. Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context.

*Williams*, 529 U.S. at 408. This Court concluded, however, that, "[t]oday's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)." *Id.* at 408-09. Following this Court's decision to decline to address how such "extension of legal principle" cases should be treated, the circuits now have split on the proper treatment of such cases.

In the decision below, the Ninth Circuit recognized that this Court "has not had a specific occasion to analyze how a defendant's juvenile status may alter an 'in custody' determination." App. A22. And, the court acknowledged that its analysis "involves the extension of the principle that juvenile status is relevant to the conduct of a custodial interrogation to the further determination whether a defendant is, in fact, 'in custody.'" App. A23. Despite the foregoing, the Ninth Circuit held that, under 28 U.S.C. § 2254(d)(1), it was objectively unreasonable for the state court to have failed to extend consideration of a defendant's juvenile status from the context of voluntary confession and waiver of constitutional rights to the context of "in custody" determination for *Miranda* purposes. App. A22-A26.

Pointing to the decision below, the Eleventh Circuit in *Hawkins v. Alabama*, 318 F.3d 1302, 1306 n.3 (11th Cir. 2003), criticized the Ninth Circuit's requirement that state courts extend Supreme Court precedent. In a sophisticated analysis, the Eleventh Circuit noted that the word "extend" does not appear in § 2254(d). The court stated, "'Extend' can mean different things at different times." *Id.* (citing *Brumley v. Wingard*, 269 F.3d 629 (6th Cir. 2001) and *Alvarado*, 318 F.3d



841). The Eleventh Circuit delineated one meaning of "extend":

> Extend might only mean to apply the ratio decidendi of Supreme Court decisions fully and completely (and not in some crabbed way) so that the rule of law covers new and different facts and circumstances as long as the new facts and circumstances -- objectively reasonably viewed -- are materially or, put differently, substantially the same that were in the mind of the Supreme Court when it laid down the rule.

*Id.* at 1306 n.3. The *Hawkins* court reasoned that this meaning of "extend" caused no conflict between 28 U.S.C. § 2254(d) and a rule requiring state courts to extend Supreme Court precedent. *Id.*

Disagreeing with the Ninth Circuit's interpretation of "extend," the Eleventh Circuit explained the meaning of "extend" as the Ninth Circuit had used it in the decision below:

> But "extend" in a different sense, can mean to "widen the range, scope, area of application of (a law, operation, dominion, state of things, etc.); to enlarge the scope of meaning of (a word)." 5 *The Oxford English Dictionary* 595 (2d ed. 1989). *See generally Alvarado*, 2002 WL 31829483 at *9, at —. In this sense, we see an impermissible conflict with Congress's expressed intent in [28 U.S.C. § 2254(d)].

*Id.* The *Hawkins* court explained as follows:

> We reject that Congress intended for [28 U.S.C. § 2254(d)'s] protection for state court decisions to be conditioned on the state court's widening, or enlarging, the rules made by Supreme Court decisions. To widen the scope of or to enlarge Supreme Court rules is not to

follow "clearly established" Supreme Court law, but is to innovate.

*Id.* The Eleventh Circuit held that under 28 U.S.C. § 2254(d), a state court is not required to predict that the Supreme Court might widen its rule if the Supreme Court were faced with new and substantially different circumstances. *Id.*

Here, in contrast, the Ninth Circuit required the state court to predict that this Court would widen its rules if faced with new and substantially different circumstances.[2/] The Ninth Circuit noted in the decision below that the state court had adhered to this Court's objective test in determining "custody" for *Miranda* purposes. App. A7 (stating that the California Court of Appeal identified the correct legal standard for making an "in custody" determination). The Ninth Circuit, however, then held that under § 2254(d)(1), it was objectively unreasonable for the state court to have failed to extend consideration of a defendant's juvenile status from the context of voluntary confessions and waiver of constitutional rights to the context of "in custody" determinations for purposes of *Miranda*, an entirely different area of law. App. A26.

The decision below presents, precisely, the problem of whether a state court decision may be condemned as objectively unreasonable for failing to extend a legal principle to a new context under § 2254(d)(1). *See Williams v. Taylor*, 529 U.S. at 408. Given the conflict between the circuits, guidance from this Court in how to treat such "extension of legal principle" cases under 28 U.S.C. § 2254(d)(1) is now necessary.

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2. Although not raised by the Warden below, it was also improper for the Ninth Circuit to grant federal habeas relief in the decision under *Teague v. Lane*, 489 U.S. 288, 299-300 (1989), which is similar to the "clearly established" portion of § 2254(d). *Williams*, 529 U.S. at 412. It has been recognized that *Teague* prohibits extending a prior decision into a "novel setting." *See Stringer v. Black*, 503 U.S. 222, 228 (1992).



## CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 9, 2003

Respectfully submitted,

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APPENDIX A

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| MICHAEL ALVARADO,<br>*Petitioner-Appellant,*<br><br>v.<br><br>R.Q. HICKMAN, WARDEN, Acting Warden of Mule Creek State Prison,<br>*Respondent-Appellee.* | No. 00-56770<br>D.C. No.<br>CV 00-00326-VAP/E<br><br>ORDER AND AMENDED OPINION |

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted
January 14, 2002—Pasadena, California

Filed December 18, 2002
Amended February 11, 2003

Before: Mary M. Schroeder, Chief Judge,
Richard D. Cudahy,* and M. Margaret McKeown,
Circuit Judges.

Opinion by Judge Cudahy

*The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

## SUMMARY

**Criminal Law and Procedure/**
**Defendants and Accused, Rights of**

The court of appeals reversed a judgment of the district court. The court held that a 17-year old suspect is "in custody" for the purpose of determining whether the suspect needed to be advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), when the police inform the suspect's mother that they "need" to speak with the suspect; the suspect's parents are refused permission to be present during a police interview; the police repeatedly pressure the suspect to tell the "truth" after the suspect denies any knowledge or involvement in a crime; only after a substantial amount of incriminating material is obtained from the suspect is the suspect told he can use the phone; and, the suspect is only told at the end of the interview that he is free to go.

Approximately one month after a murder occurred at a shopping mall in Santa Fe Springs, California, Sheriff's Detective Cheryl Comstock contacted appellant Michael Alvarado's mother at her place of employment and informed her that police officials "needed" to speak to her. Both Alvarado's mother and father accompanied their son to the sheriff's station; however, they were refused permission to be present during the interview. At the time, Alvarado was 17 years old, had no criminal history, and had never been questioned by the police. The interview, which was conducted exclusively by Comstock, lasted approximately two hours. During that time, Alvarado was not given a statement to sign indicating in any manner that he was participating voluntarily in the interview, nor was he advised of his *Miranda* rights. Despite the fact that Alvarado initially denied any knowledge or involvement in a crime, Comstock repeatedly pressured



Alvarado to tell the "truth." Shortly thereafter, Alvarado began to divulge details of the murder and of his role in hiding the murder weapon. Only after a substantial amount of incriminating material had been obtained, Alvarado was told that he could use the phone, and only at the end of the interview did Comstock inform Alvarado that he was free to go.

Alvarado was subsequently charged with murder and attempted robbery in state court. During the jury trial, Alvarado's statements during the interview were admitted into evidence. Alvarado later took the witness stand in his own defense. Ultimately, Alvarado was convicted of second degree murder and attempted robbery. His conviction was subsequently affirmed by the California Court Appeal, and his petition for review by the California Supreme Court was denied. Alvarado then filed a petition for habeas corpus in federal district court, claiming that his Fifth Amendment rights were violated because he incriminated himself without ever being informed of his rights under *Miranda*. The magistrate judge recommended that the petition be dismissed. The district court denied Alvarado's petition.

Alvarado appealed.

**[1]** *Miranda* warnings are required only when suspect interviewed by the police is "in custody." The test for a custody determination is whether, under the totality of circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave. **[2]** Several factors are relevant to the determination, including: (1) the language used by the officer to summon the individual; (2) the extent to which he or she is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and, (5) the degree of pressure applied to detain the individual.

**[3]** Alvarado's status as a minor was an important subsidiary issue that potentially altered the constitutional analysis. **[4]** A criminal defendant's age is a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary. **[5]** The Supreme Court has noted that

special problems may arise with respect to waiver of the privilege against self-incrimination by or on behalf of children, and has stated that when counsel was not present when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair. **[6]** Instead of exercising the "greatest care" to ensure that Alvarado's statements were not the product of his youth and inexperience with police, Comstock essentially ignored Alvarado's status as a minor.

**[7]** Based on the Supreme Court's jurisprudence dealing with the special due process considerations that pertain to juvenile defendants, there was no reason why similar safeguards, commensurate with the age and circumstances of a juvenile defendant, would not apply equally to an "in custody" determination. Moreover, the issue of parental involvement, at the behest of police officials, to arrange the police interview with Alvarado and the subsequent refusal by police to let his parents attend the interview were relevant issues in the totality of circumstances.Considering these factors, a reasonable 17-year-old in Alvarado's position would not have felt at liberty to terminate the interrogation and leave.

**[8]** Further, it had to be concluded that the improper admission of Alvarado's statements during the interrogation by Comstock, which were tape-recorded and played in open court, had a substantial and injurious effect on the jury's verdict. **[9]** Thus, the district court's denial of Alvarado's petition for writ of habeas corpus had to be reversed and the matter remanded to the district court for entry of judgment granting a conditional writ of habeas corpus to Alvarado.

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## COUNSEL

Tara K. Allen, Malibu, California, for the petitioner-appellant.



Deborah J. Chuang, Deputy Attorney General, Los Angeles, California, for the respondent-appellee.

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## ORDER

On consideration of the petition of the Appellee for rehearing with suggestion for rehearing en banc filed December 31, 2002, in the above-captioned case, no member of the court requested a vote on the en banc request and all of the judges on the panel have voted to deny a rehearing.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

The Appellant's emergency motion for immediate release is DENIED.

The Appellee's emergency motion for modification of the opinion is GRANTED.

The opinion of this court in the above-captioned case issued December 18, 2002, is amended as follows:

Slip Op. page 29, lines 27-31, change "Alvarado's petition for a writ of habeas corpus is GRANTED. We VACATE his state court conviction for second degree murder and attempted robbery. If a retrial of the defendant is in prospect, it shall be undertaken within 120 days of entry of this judgment."

to

"The district court's denial of Alvarado's petition for writ of habeas corpus is REVERSED. On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state begins trial proceedings within 120 days of the issuance of the mandate."

## OPINION

CUDAHY, Circuit Judge:

Michael Alvarado was convicted of second degree murder and attempted robbery and is currently serving a 15-year to life sentence in California state prison. Alvarado's conviction was obtained primarily based on statements he made during a two-hour interrogation that occurred when he was 17 years old. Alvarado now seeks a writ of habeas corpus, alleging that he was deprived of his Fifth Amendment rights in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The district court denied Alvarado's request for relief. Our review of this case is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which permits us to grant a federal writ of habeas corpus only if the underlying state court decision is either contrary to, or an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court. *See* 28 U.S.C. § 2254(d)(1).

In *Haley v. Ohio*, 332 U.S. 596 (1948), the Supreme Court established the legal principle that juvenile defendants are, in general, more susceptible to police coercion than adults; as such, due process demands that a defendant's juvenile status be taken into consideration when determining the proper procedural safeguards that attach to a custodial interrogation. *Id.* at 599-601. During the last half century, the Court has consistently reaffirmed this principle. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 693 (1993); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). To date, the Supreme Court has not directly addressed the issue of how a defendant's juvenile status modifies an "in custody" determination for the purposes of *Miranda*. However, *Haley* and its progeny are highly instructive precedents to the case now before us. If a juvenile is more susceptible to police coercion during a custodial interrogation, then the same juvenile is also more susceptible to the impression that he is, in fact, in custody in the first instance.



In this case, the California Court of Appeal identified the correct legal standard for making an "in custody" determination. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (stating that an "in custody" determination requires an inquiry into whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave").[1] But the California Court of Appeal (and the district court upon habeas review) failed to address how Alvarado's juvenile status, including the involvement of his parents at the behest of the police, affected the "in custody" determination. Relevant Supreme Court precedents lead us to conclude that Alvarado's youth and inexperience with the police are simply too important to be ignored. Moreover, on the facts of this case, proper consideration of this additional factor compels a different outcome, even under the highly deferential standard of review mandated by the AEDPA. We therefore REVERSE the judgment of the district court.

### I.

The underlying facts of this case are not in dispute. On the night of September 22, 1995, a murder occurred at a shopping mall in Santa Fe Springs, California. Approximately one month later, Sheriff's Detective Cheryl Comstock contacted the defendant's mother at her place of employment and informed her that police officials "needed" to speak to her son, Michael Alvarado. Alvarado's mother told Comstock that Michael's father would bring him to the Sheriff's station so he could be interviewed. Both Alvarado's mother and

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1. The state court cited another state court opinion, but the standard for making the in custody determination is the same as the relevant federal standard. *See People v. Soto* [*& Alvarado, et al.*], No. 97DA2213, slip. op. at 12,18 (Cal. Ct. App., 2d Dist., Sept. 13, 1999) (*Soto*) (citing *People v. Ochoa*, 19 Cal. 4th 353, 401-02 (1998)).

father accompanied their son to the Sheriff's station. However, they were refused permission to be present during the interview. When these events occurred, Alvarado was 17 years old, had no criminal history and had never been questioned by the police.

The interview, which was conducted exclusively by Comstock, lasted approximately two hours. During that time, Alvarado was not given a statement to sign indicating in any manner that he was participating voluntarily in the interview, nor was he advised of his *Miranda* rights. Alvarado initially offered an account of his activities on the night of the murder that did not include reference to the shooting or to the hiding of a gun (the most incriminating aspects of his subsequent statements). Comstock then expressed disbelief at Alvarado's version of events and informed him that she, in fact, had witnesses who said "quite the opposite." Shortly thereafter, Alvarado began to divulge details of the murder and of his role in hiding the murder weapon. Well into the course of the interview, and after Alvarado had started talking about the shooting and the hiding of the gun, Comstock made comments implying that Alvarado would be going home at the end of the interview. Alvarado's statements during the interview were admitted into evidence at trial. Alvarado later took the witness stand in his own defense.

Alvarado was convicted of second degree murder and attempted robbery in a jury trial. His conviction was subsequently affirmed by the California Court of Appeal on September 13, 1999. In both the trial court and on appeal, Alvarado raised his age as a relevant factor in the *Miranda* analysis. Unfortunately, the decision of the California Court of Appeal did not specifically discuss whether Alvarado's juvenile status altered the *Miranda* analysis. Instead, the court concluded that "a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave. The interrogation was not custodial and no *Miranda* warnings were required." *Soto*, No. 97DA2213, slip op. at 18.



From the face of the opinion, it does not appear that Alvarado's age and inexperience with the police were included as part of the "in custody" analysis. In October 1999, Alvarado filed a Petition for Review in the California Supreme Court, which was denied on December 15, 1999.

On March 6, 2000, petitioner filed a petition for habeas corpus, pursuant to 28 U.S.C. § 2254, in the district court. On July 5, 2000, a magistrate judge issued a report recommending that the district court dismiss the petition with prejudice. Applying a totality of circumstances standard for determining whether Alvarado was in custody, the magistrate judge concluded that a reasonable person during the interrogation would have felt free to leave; therefore, Alvarado was not "in custody" during the interview.

On August 8, 2000, the district court adopted the magistrate's report and recommendation and denied Alvarado's petition. The district court also denied Alvarado's request for a certificate of appealability. On December 6, 2000, this court granted Alvarado's certificate of appealability with respect to one issue: "whether statements made by defendant were erroneously admitted by the trial court in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)."

II.

A denial of a writ of habeas corpus presents a question of law that is reviewed de novo, though factual findings will be reviewed for clear error. *See Hartman v. Summers*, 120 F.3d 157, 160-61 (9th Cir. 1997); *Perez v. Marshall*, 119 F.3d 1422, 1425-26 (9th Cir. 1997). A determination whether an individual is "in custody" for the purposes of *Miranda* warnings "is really a mixed question of law and fact, which is subject to de novo review by appellate courts"; however, the "state trial court's answers to the 'scene- and action-setting questions' (i.e., the underlying factual questions) still are entitled to a presumption of correctness." *Bains v. Cambra*, 204

F.3d 964, 972 (9th Cir. 2000) (citing *Thompson*, 516 U.S. at 111-12).

This case is, of course, a collateral appeal filed pursuant to 28 U.S.C. §§ 2253, 2254. Several years ago, the AEDPA modified these statutory sections and made more deferential the standard of review to be applied by a federal court in examining the claims of a prisoner under judgment of a state court. In this circuit, review of a habeas petition under the AEDPA requires a two-stage inquiry. The first question is "whether the state court erred at all." *Anthony v. Cambra*, 236 F.3d 568, 578 (9th Cir. 2000) (citing *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000)). If the answer is yes, then we apply the AEDPA standard of review, which inquires whether the state court's "error" was contrary to, or involved an unreasonable application of, clearly established federal law, as defined in the precedents of the U.S. Supreme Court. *See* 28 U.S.C. § 2254(d)(1); *Van Tran*, 212 F.3d at 1155 ("Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law under AEDPA, promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value."). We now address in order the two stages of this inquiry.

A.

**[1]** In the case now before us, Alvarado claims that his Fifth Amendment rights were violated because he incriminated himself without ever being informed of his rights under *Miranda*. 384 U.S. at 444. The Supreme Court's holding in *Miranda*, of course, generally precludes the evidentiary use of statements resulting from a custodial interrogation unless the suspect has been first advised of his or her constitutional rights. *See Stansbury v. California*, 511 U.S. 318, 322 (1994); *Miranda*, 384 U.S. at 444. Although *Miranda* warnings are



required only when a suspect interviewed by the police is "in custody," *Stansbury*, 511 U.S. at 322; *Miranda*, 384 U.S. at 444, Alvarado asserts that he easily passes the Supreme Court's test for a custody determination, which is whether, under the totality of circumstances, "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112; *see also Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (holding that "the only relevant inquiry [to determine whether a suspect was 'in custody'] is how a reasonable man in the suspect's position would have understood his situation").

**[2]** Ninth Circuit case law has further elaborated the "totality of circumstances" inquiry by identifying several factors that are relevant to the "in custody" determination:

> Pertinent areas of inquiry include [1] the language used by the officer to summon the individual, [2] the extent to which he or she is confronted with evidence of guilt, [3] the physical surroundings of the interrogation, [4] the duration of the detention and [5] the degree of pressure applied to detain the individual. Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave.

*United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981); *accord United States v. Butler*, 249 F.3d 1094, 1099 (9th Cir. 2001); *United States v. Gregory*, 891 F.2d 732, 735 n.3 (9th Cir. 1989).

Under the specific facts of this case, Alvarado presents a compelling argument. Detective Comstock contacted Alvarado's mother at her place of employment and informed her that the police "needed" to speak with her son. Both parents then accompanied Alvarado, who was then only 17 years old, to

the Sheriff's station so that he could be interviewed. Despite the fact that Alvarado had never been questioned by police before, his parents were refused permission to be present during the interview. Alvarado was then escorted to an interrogation room, where Detective Comstock conducted a two-hour interview about the events of September 22, 1995. Despite the fact that Alvarado initially denied any knowledge or involvement in a crime, Comstock repeatedly pressured Alvarado to tell the "truth" as purportedly disclosed by the three notebooks of notes she had compiled from her interviews with alleged witnesses to the crime. Well into the course of the interview, after a substantial amount of incriminating material had been obtained, Alvarado was told that he could use the phone. Only at the end of the interview did Comstock inform Alvarado that he was free to go.

In response, the State argues that Supreme Court precedents have consistently held that when a suspect is not placed under arrest, voluntarily goes to the police station and is allowed to leave unhindered by the police after a brief interview, a finding of custody for *Miranda* purposes is unwarranted. *See, e.g.*, *California v. Beheler*, 463 U.S. 1121, 1122-25 (1983) (no custody found when suspect voluntarily came to police station, was told he was not under arrest and was allowed to leave after thirty minute interview); *Oregon v. Mathiason*, 429 U.S. 492, 493-95 (1977) (no custody found when officer left card at suspect's home stating that he would "like to discuss something" and to call, suspect voluntarily came to police station, was told he was a suspect, and was allowed to leave at conclusion of thirty minute interview). Moreover, the State points out that a determination of custodial interrogation does not necessarily follow from the fact that the interviewee is suspected of a crime, is questioned in the confines of a police station or is subjected to trickery or deceit during the course of the police interview. *See Mathiason*, 429 U.S. at 495-96 (police falsely stated that suspect's fingerprints had been found at the scene of the crime). In the instant case, the State argues that Comstock merely told Alvarado that she did not believe his version of the September 22 events.



Nevertheless, Alvarado makes a strong case that *Mathiason*, a principal case relied on by the district court to deny Alvarado's *Miranda* claim, is distinguishable on several grounds. First, the suspect in *Mathiason* came to the police station voluntarily and was told immediately that he was not under arrest. *Id.* at 495. In contrast, arrangements for the Alvarado interview were made by his parents, who accompanied him to the police station; moreover, Alvarado was never told he was *not* under arrest. Second, the interview in *Mathiason* lasted only thirty minutes, and the suspect admitted his guilt within the first five minutes. *Id.* at 493. In the case now before us, Alvarado was interviewed for a full two hours and repeatedly denied any involvement in the shooting incident. Only after he was subjected to various interrogation tactics designed to break down his defenses did he offer any incriminating statements. Moreover, these statements occurred well into the course of the interview.[2] Third, the suspect in *Mathiason* was a parolee who obviously had some knowledge of the criminal justice system. *Id.* In contrast, Alvarado had no prior experience with the police. To buttress this point, Alvarado directs our attention to *Minnesota v. Murphy*, 465 U.S. 420 (1984), which reasoned:

> Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and

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2. The record contains 61 pages of interview transcript. Discussion of the shooting—and Comstock's disbelief in Alvarado's initial account of events—does not begin until page 20, approximately one-third of the way into the two hour interview. Thus, approximately 40 minutes had elapsed before Alvarado began to discuss his knowledge of the shooting and his role in hiding the murder weapon.

> to insulate him from psychological intimidation that might overbear his desire to claim the [Fifth Amendment] privilege.

*Id.* at 433 (ruling that parolee who gave incriminating testimony during scheduled meeting with parole officer was not "in custody" for purposes of *Miranda*).

Based on these considerations, we agree with Alvarado that the Supreme Court authorities relied on by the state court do not control the specific facts of this case. Namely, Alvarado was only 17 years old and had no criminal history when the interview occurred, it lasted for approximately two hours (the interviews in *Mathiason* and *Beheler* lasted thirty minutes) and his parents, who brought Alvarado to the police station at the request of Detective Comstock, were refused permission to be present during the interview.

**[3]** Although both Alvarado and the State make their "in custody" arguments under an objective standard, Alvarado's status as a minor is an important subsidiary issue that potentially alters the constitutional analysis. Unfortunately, this issue was essentially ignored in the prior state and federal court proceedings. The State cites *United States v. Erving L.*, 147 F.3d 1240 (10th Cir. 1998), to establish that the standard for evaluating the existence of "custody" remains objective. However, our own reading of *Erving L.* suggests that the Tenth Circuit did employ the objective standard, but modified it to account for the defendant's status as a minor. *See id.* at 1248 ("Given these facts, *a reasonable juvenile* in E.L.'s position would not have believed that the officers had curtailed his freedom of movement to a degree associated with formal arrest.") (emphasis added). Alvarado seems to adopt a similar age-modified objective standard, albeit without legal citation, when he makes the following argument:

> A reasonable 17-year-old with no prior experience with being questioned by law enforcement would most likely believe that if he is at a police station being questioned by a police officer and the officer is stating repeatedly that she knows that he is lying and he is being cajoled to tell the truth, that he is not free to get up and leave, at least not until he has satisfied the officer's desire for the "truth."



Appellant's Br. at 16.

**[4]** Under the Supreme Court's due process jurisprudence, a criminal defendant's age has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary. *See, e.g., Withrow*, 507 U.S. at 693 (noting that a defendant's "maturity" is one of the factors used to determine if a defendant's confession was voluntary); *Michael C.*, 442 U.S. at 725 ("Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination."); *Schneckloth*, 412 U.S. at 226 (stating that determination whether consent to search a car was voluntary is made under the totality of circumstances, including "the youth of the accused"); *In re Gault*, 387 U.S. at 45 ("This court has emphasized that admissions and confessions of juveniles require special caution."); *Gallegos*, 370 U.S. at 54 (ruling under the totality of circumstances that confession of 14-year old to charges of assault and robbery could not be "compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"); *Haley*, 332 U.S. at 599-601(ruling that murder confession made by 15-year old without consultation with counsel or parents "cannot be judged by the more exacting standards of maturity" and that defendant's due process rights had thus been violated).

Another possible dimension of the present case is how parental authority over a minor, who happens to be a criminal suspect, affects the "in custody" determination. This aspect

may be particularly difficult to analyze because custodial status may be viewed as essentially ancillary to the issue of coercion. That is, certain police actions may be coercive in part because they take place in a setting where the suspect does not reasonably feel free to leave, and thereby escape the application of coercive measures.

Here, the involvement of Alvarado's parents and, most relevantly, their absence from the interrogation at the behest of the police, may be significant factors in the events leading up to his incriminating statements. First, Comstock enlisted the parental control of Alvarado's parents over their minor son by approaching Alvarado's mother rather than going directly to him. So the delivery of Alvarado to the sheriff's station (with its consequent restriction of his freedom of movement) was effected indirectly by Comstock (but with the intervening aid of the parents) and without any manifestation of assent by Alvarado to the exercise of official authority. Second, Alvarado was denied the protective presence of his parents when Comstock denied their request to be present during the interview. Their "protective presence" would appear, at least on the face of things, to be more relevant to the coercive conduct of the interview than to their having any role in facilitating Alvarado's freedom to leave the interrogation room.[3/]

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3. Although the ambiguous role of Alvarado's parents in contributing to the "in custody" prong of the analysis (in contrast to their significance to the larger issue of coercion) is hard to parse, we are aware of the Supreme Court's admonition in *Colorado v. Connelly*, 479 U.S. 157 (1986), that "the Fifth Amendment Privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' " *Id.* at 170 (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). And in *Erving L.*, the Tenth Circuit determined that *Connelly* applied to a juvenile setting where the suspect's parents urged him to "cooperate with the officers to 'clear his conscience.' " 147 F.3d at 1248. Neither *Erving L.*'s quite distinguishable exercise of parental intervention nor the dicta in *Connelly* involving the coercive significance of a psychotic "voice of God" seem to have much to do with the role of the parents in the case before us.



**[5]** To assess how and whether parental involvement and/or juvenile status affect the "in custody" determination for *Miranda* purposes, we find *In re Gault* instructive. This case also involved the interrogation of a juvenile, although, of course, the "in custody" status itself was not in dispute. 387 U.S. at 42-43. But the reasoning of the Supreme Court is important:

> [T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.
>
> The "confession" of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence, as far as appears.

*Id.* at 55-56 (footnote omitted).

**[6]** The "greatest care" principle cited in *Gault* appeared in the context of determining the minimum due process requirements that attach to a juvenile's waiver of his Fifth Amendment privilege against self-incrimination. Yet, if a juvenile is more susceptible to police coercion during a custodial interro-

gation than would be a similarly situated adult, there is no reason why the same juvenile would not similarly be less capable of determining whether he was, in fact, in custody in the first place.[4] In the case now before us, 17 year-old Alvarado was subjected to a two-hour interrogation in a police interrogation room, with Comstock's expressing disbelief in Alvarado's version of events and informing him that she had witnesses who said "quite the opposite." Instead of exercising the "greatest care" to ensure that Alvarado's statements were not the product of his youth and inexperience with police, *id.* at 55, Comstock essentially ignored Alvarado's status as a minor. At a minimum, Comstock could have accommodated Alvarado's parents, who were then waiting in the station lobby, by allowing them to be present during the interview with their son.

**[7]** When applying the "totality of circumstances" test for an "in custody" determination, we believe that the state court fell short when it failed to address, much less analyze, Alvarado's status as a minor. Based on the Supreme Court's jurisprudence dealing with the special due process considerations that pertain to juvenile defendants, we see no principled reason why similar safeguards, commensurate with the age and

4. The Court's holding in *Gault* was explicitly limited to the adjudicative phase of juvenile proceedings. *See* 387 U.S. at 31 n.48 ("The problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability to other steps of the juvenile process."). The juvenile defendant in *Gault* was convicted of delinquency based solely on a confession that the Court determined was constitutionally defective. *Id.* at 56. The Court thus held that without a valid confession, "a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements." *Id.* at 57. However, the fact that the Court limited its holding in this way does not weaken the opinion's persuasive reasoning; rather, it speaks to procedural peculiarities of the juvenile process that are not at issue in the present case.



circumstances of a juvenile defendant, would not apply equally to an "in custody" determination.[5] Moreover, the issue

5. When we survey the landscape of state court decisions, we note that every jurisdiction that has squarely addressed the issue has ruled that juvenile status is relevant to the "in custody" determination, either as a factor under the totality of circumstances test, or by way of modification to the reasonable person standard. *See In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002) (ruling that objective test applies to juvenile context, "but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement"); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to determine whether the defendant "would have believed that he was in custody at the time of the interrogation at the police station"); *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. App. 1999) (surveying the large number of state courts that have included age as a factor in an "in custody" determination and adopting a rule that "*expressly* provides for consideration of age under the reasonable-person standard established [by the U.S. Supreme Court] in *Stansbury*") (emphasis added); *State v. D.R.*, 930 P.2d 350, 353 (Wash. Ct. App. 1997) (applying standard of "whether a 14-year-old in [the defendant's] position would have reasonably supposed his freedom of action was curtailed") (quotations omitted); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) (stating that a juvenile in-custody determination "must consider additional factors, such as the juvenile's education, age, and intelligence"); *In re Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (ruling that objective test applied to in-custody determination for *Miranda* purposes, "but with additional elements . . . including the child's age, maturity and experience with law enforcement"); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (en banc) (ruling that "the circumstances of the interrogation, including the length of the interrogation and the fact that it involved an eleven-year-old, would lead a reasonable person in [the defendant's] situation to feel that he had no choice but to stay and listen to the officer") (quotations omitted); *In re Loredo*, 865 P.2d 1312, 1315 (Or. Ct. App. 1993) (constructing test "whether a reasonable person in child's position—that is, a child of similar age, knowledge and experience, placed in a similar environment—would have felt required to stay and answer all of [the officer's] questions"); *In re Robert H.*, 599 N.Y.S.2d 621, 623 (N.Y. App. Div. 1993) ("Under the circumstances, we conclude that a reasonable 15-year-old, in the position of Robert, would not have believed he was free to leave the scene."); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988) ("On the question whether the juvenile was in custody, the test is how a reasonable person in the juvenile's position would have understood his situa-

of parental involvement, at the behest of police officials, to arrange the police interview with Alvarado and the subsequent refusal by police to let his parents attend the interview are certainly relevant issues in the totality of circumstances. *See Thompson*, 516 U.S. at 113 (stating that "in custody" determination is made against the backdrop of historical facts that make up the "totality of circumstances"); *see also* note 3, *supra*.[6] Considering these additional factors in the objective determination of custodial status, we do not believe that a reasonable 17-year-old in Alvarado's position would have felt "at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112; *cf. Berkemer*, 468 U.S. at 442 (holding that "the only relevant inquiry [in an 'in custody' determination] is how a reasonable man in the suspect's position would have understood his situation").

B.

We proceed now to the second level of the prescribed inquiry, which requires the narrower focus whether the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court held that the "contrary to" and "unreasonable application"

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tion."); *People v. Savory*, 435 N.E.2d 226, 230 (Ill. App. Ct. 1982) (stating that "[n]umerous factors" are relevant to the in custody determination, including "the age, intelligence and mental makeup of the accused").

6. State courts have also acknowledged the absence of parents as a relevant factor under the totality of circumstances. *See, e.g., Doe*, 948 P.2d at 173 (ruling that objective test applied to in custody determination for *Miranda* purposes, "but with additional elements . . . including . . . the presence of a parent or other supportive adult"); *State v. J.Y.*, 623 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 1993) (considering "juvenile's age" and "lack of a parent being present" as relevant factors under the totality of circumstances).



clauses represent alternative grounds for habeas relief. *Id.* at 404-05.[7]

The Supreme Court has recently confirmed the narrow inquiry available under the first clause. A state court acts contrary to established precedents if it " 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent.' " *Early v. Packer*, ___ U.S. ___, 123 S. Ct. 362, 365 (2002) (citing *Williams*, 529 U.S. at 405).

Under the second clause, a state court's decision involves an "unreasonable application" of federal law if it either (1) correctly identifies the governing legal rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Hernandez v. Small*, 282 F.3d 1132, 1142 (9th Cir. 2002) (citing *Van Tran*, 212 F.3d at 1148); *Anthony*, 236 F.3d at 578 (citing *Williams*, 529 U.S. at 404-06). As explained, *infra*, we believe this case is best analyzed under the "unreasonable application" clause of the AEDPA.

In reviewing a state court judgment under the AEDPA, "we examine the state court's last reasoned decision." *Benn v. Lambert*, 283 F.3d 1040, 1052 n.7 (9th Cir. 2002); *see also Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). Our analysis under the "unreasonable application" clause is guided by the doctrine of "clear error." *Anthony*, 236 F.3d at 578. Under this standard, reversal is warranted "only

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7. *Williams* resulted in a highly fractured decision by the Supreme Court in which only specific parts of the lead opinion by Justice Stevens were adopted by a majority of the Court. 529 U.S. at 367. However, Part II of Justice O'Connor's concurrence was joined by Chief Justice Rehnquist and Justices Kennedy, Thomas and Scalia, thus making it the opinion of the Court for matters discussed in it. *Id.* at 399. Part II of Justice O'Connor's concurrence addresses the proper interpretation of 28 U.S.C. § 2254(d)(1), which is at issue in the case now before us.

where the court of appeals is left with a 'definite and firm conviction' that an error has been committed." *Id.* (quoting *Van Tran*, 212 F.3d at 1153).

Finally, a critical factor to bear in mind when analyzing a case under the "unreasonable application" clause is whether the relevant Supreme Court precedents can be fairly categorized as "clearly established" federal law. § 2254(d)(1). In *Williams*, the Supreme Court ruled that the phrase "clearly established Federal Law, as determined by the Supreme Court of the United States," § 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions." 529 U.S. at 412; *see also Tyler v. Cain*, 533 U.S. 656, 664 (2001) (stating that " 'determined' and 'held' are synonyms in the context of § 2254(d)(1)"). We determine de novo what is "clearly established federal law" within the meaning of the AEDPA. *LaJoie v. Thompson*, 217 F.3d 663, 668 (9th Cir. 2000); *Canales v. Roe*, 151 F.3d 1226, 1228-29 (9th Cir. 1998). If the federal law is not clearly established at the time of the state court determination, § 2254(d)(1) bars relief. *Williams*, 529 U.S. at 412.

We begin our AEDPA analysis by stating that Supreme Court case law has clearly established the general right that an interrogation without *Miranda* warnings violates the Fifth Amendment where, under the totality of circumstances, a reasonable person would not have felt free to terminate the conversation with police officials and leave; in other words, the person being interviewed is "in custody." *See Thompson*, 516 U.S. at 112; *Stansbury*, 511 U.S. at 322; *Berkemer*, 468 U.S. at 440-42; *Beheler*, 463 U.S. at 1125; *Mathiason*, 429 U.S. at 494-95. Even acknowledging that the Supreme Court has not had a specific occasion to analyze how a defendant's juvenile status may alter an "in custody" determination, it does not follow that it would be *reasonable*, within the meaning of the AEDPA, for the police to ignore a juvenile's age and experience when applying the "totality of circumstances" test.



Turning to the AEDPA framework, we believe this case is best analyzed under the "unreasonable application" clause, which permits a writ of habeas corpus only if the judgment of the state court "(2) . . . fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *Anthony*, 236 F.3d at 578 (citing *Williams*, 529 U.S. at 407). The relevant legal principle here, amply supported by Supreme Court precedent, is that juvenile defendants are accorded heightened procedural safeguards commensurate with their age and experience. *Haley* and its progeny, *supra*, have clearly established this principle in the context of custodial interrogations. If juveniles are more susceptible to making "involuntary" confessions or waivers of their constitutional rights while in police custody, under an analogous totality of circumstances inquiry, these same Supreme Court cases compel the conclusion that a reasonable juvenile would be more susceptible to the impression that he "was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112. It cannot reasonably be argued that a factor that is so important in analyzing the conduct of a custodial interrogation can become insignificant in the analysis of the circumstances that give rise to that situation—namely, in the factual setting that determines whether a juvenile is, in fact, "in custody."

In many respects, the present case would be more straightforward if the California Court of Appeal had directly addressed the issue of Alvarado's age and inexperience with the police and concluded that these additional circumstances were simply irrelevant to the underlying question whether Alvarado was "in custody." If the court had made such a ruling (rather than skipping the analysis altogether), the constitutional infirmity would be facially apparent.

Our analysis involves the extension of the principle that juvenile status is relevant to the conduct of a custodial interrogation to the further determination whether a defendant is, in fact, "in custody." But our AEDPA precedents explicitly contemplate the possibility that such an extension may be

required by relevant Supreme Court case law. *See Hernandez*, 282 F.3d at 1142 ("A state court's decision can involve an 'unreasonable application' of Federal law if it . . . 2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable."); *Anthony*, 236 F.3d at 578 (same); *Van Tran*, 212 F.3d at 1150 (same).[8] In the case before us, we are compelled to this conclusion by the fact that a totality of circumstances approach applies equally to the appraisal of police conduct and to the "in custody" analysis. At least in the context of determining whether a juvenile "knowingly and voluntarily decided to forgo his [Fifth Amendment] rights to remain silent," the Supreme Court has unequivocally stated:

> The totality approach permits—*indeed, it mandates*—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

*Michael C.*, 442 U.S. at 725 (emphasis added).[9]

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8. Additionally, as we have noted, every state court that has addressed this threshold question of how juvenile status affects the "in custody" analysis has ruled that juvenile status is a factor in the "in custody" determination. *See* note 5, *supra*. Of course, these cases often rely upon state court precedents to reach this conclusion. Unless and until a state court has determined that state constitutional protections do not make juvenile status relevant to the "in custody" determination, the applicability of federal constitutional protections would ordinarily not be discussed by the state court's opinion. But, despite our exhaustive research, we have been unable to locate a single state court that has found juvenile status irrelevant. The unusual feature of the present case is that Alvarado squarely raised this issue, but the state court simply failed to undertake a meaningful analysis under either state or federal law.

9. It should be noted that the Court's holding in *Michael C.* has been viewed by some commentators as a retreat from its earlier decisions in which a defendant's juvenile status was arguably the controlling factor in the constitutional analysis. *See, e.g.*, Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 Vand. L. Rev. 1355, 1373-74 (2000) (noting that *Michael C.* "was a constriction of juvenile *Miranda* rights when read against *Haley, Gallegos* and *Gault* . . . ."). In *Michael C.*, the criminal defendant was a 16-year-old with an extensive criminal history who was accused of murder. After the defendant was taken into custody on a murder charge, the police read the defendant his *Miranda* rights. The defendant then requested the presence of his probation officer, which he subsequently argued was, in fact, an assertion of his Fifth Amendment rights. However, much to the chagrin of four dissenting justices, the majority rejected this argument. *See* 442 U.S. at 730 (Marshall, J., dissenting) ("[A] juvenile's request for his probation officer should be treated as a per se assertion of Fifth Amendment rights."); *id.* at 733-34 & n.4 (Powell, J., dissenting) (disputing whether the interrogating officer had exercised "the greatest of care" as required by *Gault* and whether the 16 year-old defendant "was subjected to a fair interrogation free from inherently coercive circumstances"). The central issue that divided the Court in *Michael C.* was the extent to which a criminal defendant's juvenile status altered the waiver analysis under *Miranda*. However, as made clear by the passage from *Michael C.* quoted in the text, juvenile status remains an important factor in a due process waiver analysis. The rule articulated by the majority is in no way diminished by the fact that the four dissenting justices urged an *even more* robust rule affecting juvenile defendants. Indeed, unlike the present case, the juvenile's experience with the police was a major factor in the Court's totality of the circumstances analysis.



The issue of waiver of his Fifth Amendment rights was never reached in the present case because Alvarado was never informed of his *Miranda* rights. And, as we have already noted, the cases upon which the state relies to support its contention that Alvarado was not "in custody" are distinguishable. In contrast to *Beheler* and *Mathiason*, Alvarado's "voluntary" appearance at the police station was not obtained through his own consent but instead through enlisting his mother's authority. Upon his arrival, Alvarado was never informed that he was not under arrest, and Detective Comstock summarily rejected his parents' request to be present during the interview. Alvarado was then escorted to an inter-

rogation room and subjected to a full two hours of questioning. Despite the fact that Alvarado denied any knowledge or involvement in the shooting incident, Comstock repeatedly pressured Alvarado to tell the "truth" as allegedly defined by three notebooks of notes she had compiled from earlier witness interviews. Although Alvarado was permitted to use the telephone, this accommodation was not offered until well into the course of the interview, and only after Alvarado had made several incriminating statements.[10] Only at the end of the interview did Comstock inform Alvarado that he was free to leave.

After identifying these relevant circumstances, it is simply unreasonable to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was "at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112. Moreover, when we apply the "clear error" standard, which guides our analysis under the "unreasonable application" clause of § 2254(d)(1), the totality of circumstances in this case is so compelling that we are "left with a 'definite and firm conviction' that an error has been committed." *Anthony*, 236 F.3d at 578 (quoting *Van Tran*, 212 F.3d at 1153).

C.

**[8]** Before we can conclude that Alvarado is entitled to federal habeas relief, we must consider whether improper admission of his incriminating statements by the state court had a "substantial and injurious effect" on the subsequent jury verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (defining magnitude of constitutional error that is sufficient to justify habeas relief); *Benn*, 283 F.3d at 1052 n.6 (noting that all AEDPA cases must satisfy the requirements of *Brecht*); *Bains*, 204 F.3d at 977 (joining "the vast majority of our sister

10. We estimate that the time elapsed at this point in the interview was approximately 40 minutes. *See* note 2, *supra*.



circuits by deciding that the *Brecht* standard should apply uniformly in all federal habeas corpus cases under § 2254"). Here, we do not hesitate to conclude that the admission of Alvarado's statements during the interrogation by Detective Comstock, which were tape-recorded and played in open court, had a substantial and injurious effect on the jury's verdict.

The state argues that the *Brecht* threshold has not been met because, in the absence of testimony by detective Comstock about the contents of her two-hour interview with Alvarado, the jury would have nonetheless reached a guilty verdict based on the testimony of Manuel Rivera. We disagree. In order to illustrate the relative weakness of Rivera's testimony, we will summarize certain pertinent background facts.

According to Rivera's direct testimony at trial, Rivera, Alvarado, Paul Soto (Alvarado's co-defendant) and several other youths gathered at Rivera's house on the night of September 22, 1995. Rivera testified that throughout the course of the evening he consumed "about two 40-ouncers" of Budweiser along with "Strawberry wine, [and] some more beer." After midnight, the gathering left the house and moved into a parking lot area beside an adjacent shopping center. The victim drove his pick-up truck into the parking lot and stationed himself near a dumpster, where he proceeded to collect cardboard boxes. According to Rivera, Paul Soto uttered the exclamation, "Let's jack," which Rivera interpreted as meaning that Soto and at least some other members of the gathering should steal the pick-up truck. However, at that very moment, Alvarado was in a nearby doughnut store. A few minutes later, Alvarado returned, and Soto repeated the words, "Let's jack." Rivera then testified that Alvarado responded to Soto's suggestion by saying, "Let's do it." Soto and Alvarado then approached the pick-up truck with Soto proceeding to the driver's side and Alvarado approaching the passenger's side. Rivera stated that a conversation between the victim and Soto ensued, but that he could not see the victim from his vantage point. However, he inferred from Soto's

hand gestures that a conversation was taking place. By Rivera's account, the pick-up truck was too far away for him to hear the contents of the conversation. At this point, a shot rang out and the group immediately retreated to Rivera's house. Soto went into Rivera's bedroom to take off a blood-stained shirt. Rivera then came into the bedroom and saw a black semi-automatic revolver on the floor. Rivera continued to testify that he, Soto and Alvarado subsequently went to the park to hide the gun.

Although on direct examination Rivera's account of the evening was fairly coherent, the cross-examination of Rivera by Alvarado's lawyer exposed numerous inconsistencies and weaknesses. Rivera admitted that during his earlier statements to police he had never stated that Soto *twice* uttered the phrase "Let's jack." This ambiguity is relevant because Rivera claimed that Alvarado only heard Soto utter these words the second time, *after* he returned from the nearby doughnut shop. Rivera also acknowledged that on an earlier occasion, he had confided to Alvarado's lawyer, and to a defense investigator for Alvarado, that he really could not say with certainty whether Alvarado had uttered the words, "Let's do it" or a similar exhortation and that his memory had faded since the events of September 22. Moreover, Rivera conceded that he had also smoked marijuana that night and at the time of the shooting was somewhat "stoned." Rivera admitted that from his vantage point he could not see where Alvarado was standing in relation to the pick-up truck. Perhaps most damaging to the state's case, however, was Rivera's bald admission that on several occasions he had told police that *only* Soto and Alvarado had gone to the park to hide the gun, and that all of these earlier statements had been false. Rivera said that he agreed to testify after consulting his lawyer and after he had been offered immunity. Hence, he could not now be prosecuted for any of the crimes involved in the present case.



The cross-examination of Rivera, when considered in the absence of Alvarado's incriminating statements, also casts doubt on the theory that Alvarado and Soto acted in concert. Rivera stated that he had been a close friend of Alvarado for approximately two years before the shooting incident. During that time, he had never seen Soto and Alvarado together, nor did he have any basis to believe that they even knew each before the night in question. Rivera claimed that he himself had just met Soto that evening and that he had no knowledge, before hearing the gunshot, that Soto or anyone else had a gun. Without corroborating evidence, it might seem implausible that Alvarado, who had no prior criminal record, would have agreed to commit a car jacking at gun point with someone he had met only a few hours earlier.

That said, the essential elements of Rivera's story, such as the bloody shirt and the hiding of the gun, are certainly more plausible when corroborated by Alvarado's own self-incriminating statements. If these statements had been excluded from evidence because Alvarado was not given *Miranda* warnings, the entire case against Alvarado would have come down to Rivera's inconsistent account and the testimony of Valerie Garcia (one of the youths who gathered at Rivera's house and later in the adjacent parking lot). Garcia testified that she remembered Soto and Alvarado walking off in the same general direction. Garcia stated that thereafter, when the shooting occurred, she was facing away from the direction of the pick-up truck. We believe that a witness (Rivera), who has been drinking heavily, is plagued by a tricky memory and has been granted immunity with respect to the crime for which Alvarado was prosecuted, is not powerfully credible. And Garcia added precious little that was specific to Rivera's account. There is, therefore, a high probability that Alvarado's improperly admitted statements were the lynchpin of his conviction.

The state attempts to buttress its *Brecht* argument by pointing out that Alvarado testified in his own defense; therefore, his incriminating statements would have been admissible in

any event in rebuttal. *See Oregon v. Hass*, 420 U.S. 714, 723-24 (1975) (evidence obtained in violation of *Miranda* may be used for impeachment); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (same). However, Alvarado's current counsel argues that the strategic decision about whether or not Alvarado should take the stand may have been strongly influenced by the government's use of his confession. Therefore, Alvarado's live testimony can hardly be taken for granted. *See Elstad*, 470 U.S. at 317 (" 'Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.' " (quoting *Harrison v. United States*, 392 U.S. 219, 224-25 (1968))). Based on our own examination of the record, there appears to be a strong possibility that Alvarado, if not confronted by his own statement to Comstock, would not have testified in his own defense. This being the case, we believe that the self-incriminating statements clearly pass the *Brecht* test of having a substantial and injurious effect on the jury verdict.

III.

**[9]** The district court's denial of Alvarado's petition for writ of habeas corpus is REVERSED. On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Alvarado be released from custody unless the state begins trial proceedings within 120 days of the issuance of the mandate.



APPENDIX B

FILED
JUL 5 2000

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| MICHAEL ALVARADO, | ) | NO. ED CV 00-326-VAP(E) |
| | ) | |
| Petitioner, | ) | REPORT AND |
| | ) | RECOMMENDATION OF |
| v. | ) | UNITED STATES |
| | ) | MAGISTRATE JUDGE |
| R.Q. HICKMAN, Acting Warden of Mule Creek State Prison, | ) | |
| | ) | |
| Respondent. | ) | |

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

**PROCEEDINGS**

Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" on March 6, 2000. Respondent filed an Answer on June 12, 2000. Petitioner filed a Traverse on July 3, 2000.

## BACKGROUND AND SUMMARY OF PETITIONER'S CONTENTIONS

Following a jury trial, Petitioner was convicted of murder and attempted robbery (Clerk's Transcript at 415-16). Incriminating trial evidence included statements made by Petitioner in response to questioning by a Sheriff's investigator.

Petitioner challenges his conviction, arguing he was "in custody" during the investigator's questioning, such that the investigator should have administered *Miranda* warnings to Petitioner. The state courts found Petitioner was not "in custody" during the questioning (Reporter's Transcript ("R.T.") 15; Exhibit B to Motion for Summary Dismissal, etc.," filed March 29, 2000, at 22-29; Exhibit C to "Motion for Summary Dismissal, etc.").

## STANDARD OF REVIEW

The Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, signed by the President on April 24, 1996 ("AEDPA"). Therefore, AEDPA's provisions apply. *See Lindh v. Murphy*, 521 U.S. 320, 336-37 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir.) (en banc), *cert. denied*, 522 U.S. 1008 (1997). AEDPA provides, in relevant part, that an application for writ of habeas corpus on behalf of a person in state custody shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) resulted in a decision that was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended); *see Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Weighall v. Middle*, 2000 WL 702986 (9th Cir. June 1, 2000); *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000).



## SUMMARY OF THE CIRCUMSTANCES ATTENDING THE QUESTIONING

Approximately one month after the crimes, Sheriff's detective Cheryl Comstock ("Comstock") left word at Petitioner's house and with Petitioner's mother that Comstock needed to speak with Petitioner ("Motion to Augment the Record on Appeal, etc.") ("A.R."), lodged June 12, 2000, at 208). Petitioner's mother told Comstock that Petitioner's father would bring Petitioner to the Sheriff's station so Petitioner could be interviewed. (*Id.*). Both parents came with Petitioner to the Sheriff's station and gave their permission for Comstock to interview Petitioner. (*Id.*). Petitioner was 17 years old at the time of the interview. Petitioner's parents were refused permission to be present during the interview (R.T. 9-10).

The interview, conducted exclusively by Comstock, lasted approximately two hours, from 12:30 p.m. to 2:30 p.m. (A.R. 208-68). Comstock did not advise Petitioner he was under arrest. (*Id.*). To the contrary, Comstock appeared to indicate, in the course of the interview, that Petitioner would be allowed to return home after the interview. (*Id.* at 240, 258). Petitioner did return home after the interview (R.T. 501; A.R. 268).

Comstock did not threaten, harass or attempt to deceive Petitioner (A.R. 208-68). She did express disbelief when Petitioner's initial version of events omitted any mention of the crimes (A.R. 227). She did urge Petitioner to tell the truth (A.R. 227-30). She did not advise Petitioner he would have to remain in the Sheriff's station until he told the truth (A.R. 208-68).

## DISCUSSION

For the reasons discussed herein, the Petition should be denied and dismissed with prejudice.

*Miranda* generally bars the prosecution from using statements resulting from custodial interrogation unless the suspect first was advised of his or her constitutional rights.[11/] *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *United States v. Henley*, 984 F.2d 1040, 1043 (9th Cir. 1993). For purposes of *Miranda*, "custody" is a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam). The issue of whether a suspect is in custody must be determined by the individual circumstances of the case. *Id.*; *United States v. Eide*, 875 F.2d 1429, 1433 (9th Cir. 1989); *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981). "Based upon a review of all the pertinent facts, the court must determine whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981); *see Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *see also United States v. Erving, L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (standard for evaluating existence of "custody" remains an objective standard, even where the person being questioned is a juvenile). The issue of "custody" presents a mixed question of law and fact. *Thompson v. Keohane*, 516 U.S. 99 (1995).

This Court finds that, under the totality of the circumstances attending Petitioner's interview, a reasonable person would have concluded he would be free to leave. Thus, this Court concludes Petitioner was not "in custody" during the interview. In *United States v. J.H.H.*, 22 F.3d 821, 831 (8th Cir. 1994), the Court of Appeals upheld the District Court's determination a fourteen-year-old boy was not "in custody" during a police station interview. In *J.H.H.*, as in the present case, the juvenile was questioned by only one officer, was not

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11. Respondent argues that a 1968 Congressional enactment overruled *Miranda*. The United States Supreme Court recently rejected this argument. *See Dickerson v. United States*, 2000 WL 807223 (U.S. June 26, 2000).



threatened or deceived and was not placed under arrest at the termination of the interview. *Id.* The juvenile in *J.H.H.* was told that the questioning was voluntary, that he was not under arrest and that he was free to leave at any time. *Id.* Comstock did not give Petitioner such explicit reassurances. However, Petitioner was not informed he was under arrest and did receive indications he would be free to leave upon the conclusion of the interview. Moreover, even a failure to inform a police station interviewee he or she would be free to leave does not necessarily control the custody analysis. *Davis v. Allsbrooks*, 778 F.2d 168, 171-72 (4th Cir. 1985).

Petitioner emphasizes the interview took place at a Sheriff's station. This factor does not mandate a finding of custody. "The Supreme Court consistently had held that, when a suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police after a brief interview, a finding of 'custody' for *Miranda* purposes is unwarranted." *United States v. Jones*, 818 F.2d 1119, 1123 (4th Cir. 1987); *accord California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

Petitioner alleges he knew at the time of the interview he was considered to be a suspect (R.T. 11). This factor does not mandate a finding of custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) ("Nor is the requirement of [*Miranda*] warnings to be imposed simply because . . . the questioned person is one whom the police suspect"); *accord California v. Beheler*, 463 U.S. 1121, 1125 (1983).

Petitioner emphasizes Comstock expressed skepticism regarding Petitioner's initial answers and urged Petitioner to tell the truth. However, Comstock never threatened or attempted to deceive Petitioner. In any event, courts have refused to find custody even where the interrogating officer resorts to trickery and deceit. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (police falsely stated suspect's fingerprints had been found at the scene of the crime); *Bains v. Cambra*, 204 F.3d

964, 968, 973 (9th Cir. 2000) (police falsely stated another individual had implicated the suspect in the crime).

Petitioner invites a comparison to the California Court of Appeal's decision in *People v. Aguilera*, 51 Cal. App. 4th 1151, 59 Cal. Rptr. 2d 587 (1996). The comparison is not apt. The suspect in *Aguilera* was subjected to intense, persistent, aggressive "tag team" interrogation which was, at times, threatening and intimidating. 51 Cal. App. 4th at 1159-60, 1164-65). The suspect in *Aguilera* effectively was told he would not be permitted to leave the police station until he told "the truth." 51 Cal. App. 4th at 1159-60, 1163. The pertinent circumstances of the present case stand in stark contrast to those of *Aguilera*.

Petitioner also invites a comparison to the circumstances found in *Thompson v. Keohane*, 516 U.S. 99 (1995). In *Thompson*, however, the Supreme Court determined only that the issue of "custody" presented a mixed question of law and fact. The Supreme Court did not purport to adjudicate the "custody" issue under the circumstances of that case.[12/]

Finally, the Ninth Circuit's recent decision in *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000), strongly counsels against granting habeas relief in the present case. In *Bains*, a murder suspect was questioned for hours by several officers at a police station. The officers attempted to deceive the suspect by falsely telling the suspect that a witness had implicated him. The Ninth Circuit nevertheless concluded:

> "There is no evidence here to suggest that, under clearly established federal law, a reasonable person in Bains's situation would have felt that he was not free to terminate the police interrogation . . . At the very

12. Indeed, the Ninth Circuit determined on remand that the petitioner in *Thompson* had not been in "custody" during his interrogation. *Thompson v. Keohane*, 145 F.3d 1341, 1998 WL 230928 (9th Cir. 1998) (unpublished opinion, cited only to show that law of that case), *cert. denied*, 525 U.S. 1158 (1999).



> least, the state courts' (i.e., the trial court's and the California Supreme Court's) determinations that no *Miranda* violation occurred until after Bains first had made his requests [to speak with a lawyer, with his wife and to leave the police station], cannot be said to have been so erroneous that they can be said to have resulted 'in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 973.

The same conclusion obtains in the present case. At a minimum, the state courts' *Miranda* rulings were not "so erroneous that they can be said to have resulted" in a decision "contrary to" or involving "an unreasonable application of" "clearly established Federal law, as determined by the Supreme Court of the United States." *See also Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000) (state court decision must constitute "clear error" to warrant habeas relief under the AEDPA).

## CONCLUSION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.[13/]

DATED: July 5, 2000.

s/_____
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

13. The Court need not determine whether all aspects of Petitioner's *Miranda* claim have been exhausted. Courts may deny unexhausted claims on the merits. *See* 28 U.S.C. § 2254(b)(2).

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.



FILED
AUG 8 2000
ENTERED
AUG 22 2000

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| MICHAEL ALVARADO,<br>Petitioner, | ) | NO. ED CV 00-326-VAP(E) |
| v. | ) | ORDER ADOPTING<br>FINDINGS,<br>CONCLUSIONS AND |
| R.Q. HICKMAN, Acting Warden of Mule Creek State Prison,<br>Respondent. | ) | RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE |

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 8, 2000.

s/_____
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

FILED
AUG 8 2000
ENTERED
AUG 22 2000

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| MICHAEL ALVARADO, | ) | NO. ED CV 00-326-VAP(E) |
| | ) | |
| Petitioner, | ) | JUDGMENT |
| | ) | |
| v. | ) | |
| | ) | |
| R.Q. HICKMAN, Acting Warden of Mule Creek State Prison, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: August 8, 2000.

s/_____
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE



APPENDIX C

FILED
SEP 13 1999

CERTIFIED FOR PARTIAL PUBLICATION*

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION FOUR**

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent, | B114847 |
| v. | (Super. Ct. No. VA035109) |
| PAUL R. SOTO et al.<br>Defendants and Appellants. | |

Appeal from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant Soto.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant Alvarado.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Beverly K. Falk, Deputy Attorney General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Factual and Procedural Summary and parts I, II, III, IV, V, VII & VIII.

Paul R. Soto and Michael Alvarado appeal from their judgments of conviction by jury trial of murder (Pen. Code, § 187)[1] and attempted robbery (§ 664/211).

In the published portion of this opinion, we consider Alvarado's argument that the trial court erred in refusing to reduce his first degree murder conviction to manslaughter. We conclude that since there is no basis in the evidence to justify a reduction of Alvarado's conviction to manslaughter, the trial court did not err in denying Alvarado's request. We also conclude that, while the evidence establishes that Alvarado committed first degree felony murder, rather than second degree murder, he cannot complain of error in the second degree murder conviction and sentence since any error was favorable to him.

In the unpublished portion of this opinion, we address the other arguments raised in the appeal. Soto argues that police officers persisted in questioning him after he had asked for an attorney, in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (hereafter *Miranda*). We conclude that Soto's invocation of his right to counsel was equivocal and find no violation of his rights. Soto also argues the trial court erred in denying his requested instructions to inform the jury that Manuel Rivera and Valerie Garcia were accomplices, and consequently, that their testimony had to be corroborated by another witness. These two witnesses were accessories after the fact, but not accomplices. The trial court was not required to give the accomplice instruction. Soto and Alvarado argue the prosecutor committed misconduct by displaying a large weapon in front of the jury, although it was not proved to be the murder weapon. We conclude that the rulings by the trial court and its admonition to the jury on this subject were adequate. We find no basis to reverse Soto's conviction.

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1. All statutory references are to the Penal Code unless otherwise indicated.



Alvarado argues that his punishment is constitutionally excessive. We conclude that it is not. He also raises a *Miranda* issue. He contends that he was subjected to custodial interrogation, but was not given the requisite admonitions of his rights. We conclude that the interrogation was not custodial, and hence that the officers were not obligated to admonish Alvarado of his rights. Alvarado challenges the sufficiency of the evidence to prove that he aided and abetted Soto. We find ample evidence that he was an aider and abettor. Alvarado made three *Wheeler*[2] motions on the grounds that the prosecutor used peremptory challenges based on suspect classifications. We find no error in the trial court's rulings rejecting these motions.

## FACTUAL AND PROCEDURAL SUMMARY

On the night of September 22, 1995, Soto, Alvarado, and others gathered at the home of Manuel Rivera in Santa Fe Springs. Rivera's house was adjacent to a shopping mall. During the evening the group drank various alcoholic beverages and some persons smoked marijuana. After midnight, a group including Rivera, Alvarado, Soto, and Valerie Garcia, went to the adjacent mall to use pay telephones. They saw an older truck driven by an older man (later identified as Francisco Castaneda) enter the parking lot. Garcia approached the truck and got one dollar from the driver.

Mr. Castaneda drove to a nearby dumpster and began removing cardboard from the dumpster. Soto said "Let's Jack." Rivera understood that Soto meant that he intended to steal the truck. At this time, Alvarado was in the donut shop. When Alvarado returned to the group, Soto again said "Let's Jack." Soto and appellant approached the truck. Soto walked to the driver's side of the truck. Mr. Castaneda was between the dumpster and the driver's side of the truck. Alvarado walked toward the passenger door of the truck. A gunshot, followed by

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2. *People v. Wheeler* (1978) 22 Cal.3d 258, hereafter *Wheeler*.

a scream were heard. Everyone, including Soto and Alvarado, ran back to Rivera's house.

Soto had blood on his shirt when he returned to Rivera's house. He went into Rivera's bedroom first and then into the bathroom to clean up. Soto left a black, long-barreled gun in Rivera's room. Soto told Rivera he had shot the driver of the truck when the man resisted his demand for money and the keys to the truck. Soto also warned Rivera and Alvarado to remain quiet about what had occurred. Rivera and Alvarado hid the gun in a park.

A deputy sheriff from the Norwalk station responded to a call from the shopping mall and found Francisco Castaneda dead from a bullet wound. The evidence indicated that he was shot at close range with a large caliber gun.

Rivera was granted immunity from prosecution in return for his testimony. Alvarado was interviewed by the police on October 24, 1995. (We reserve the details of the interview for our discussion of Alvarado's *Miranda* argument.) The jury heard excerpts from the interview in which Alvarado said he knew that Soto was going to rob the man and take his truck so they could get home from Rivera's place.

The prosecution also played a taped interview of Soto to the jury. In that interview, Soto said he was drunk on the night of the shooting and that the gun had fired accidentally.

The defense focused on inconsistencies in Rivera's testimony. Alvarado testified in his own defense. He denied an intent to kill Mr. Castaneda, and said he had not talked with the victim, nor made any demands. He did not have either a gun or bullets that night. He had no idea what was going on and did not encourage Soto. Soto did not testify.

Soto was found guilty of first degree murder, with the use of a gun, committed during the attempt to commit second degree robbery. He was sentenced to a term of life in prison without possibility of parole, plus four years for the firearm use. Sentence on the second count, of attempted robbery, was stayed under section 654. Soto filed a timely appeal.



Alvarado also was convicted of one count of first degree murder and one count of attempted robbery. The jury found the allegations that a principal was armed with a firearm in the commission of these offenses to be true. On Alvarado's motion, the court reduced the conviction to second degree murder. The court also granted Alvarado's request for a pre-sentence diagnostic study under section 1203.03. After considering the study, the trial court denied probation and sentenced Alvarado to a term of 15 years to life for second degree murder. It also stayed the sentence on the robbery and on the armed principal enhancement. Alvarado filed a timely appeal.

## DISCUSSION

### I

Soto argues that his statements to the police should have been excluded because the officers continued to question him after he had invoked his right to have counsel present under *Miranda*. Respondent asserts that the request for counsel was ambiguous, and that the officers were not obligated to ask clarifying questions.

Soto was interviewed about the murder of Mr. Castaneda at the Norwalk Sheriff's station on November 30, 1995. He was advised of, and waived, his constitutional rights under *Miranda*. After 30 to 35 minutes of questioning, one of the detectives told Soto that the officers knew what had occurred, and that the interview was his opportunity to tell his side. Soto replied: "I'll just wait till–till I go to court I guess and talk to my attorney you know." Detective Comstock replied: "Well that's entirely up to you." Detective Lee said: "You fell [*sic*] your attorney knows the truth and you don't?" Soto replied: "No." At that point, the interview continued, Soto made no further requests for counsel, and responded to the officers' questions.

"If a suspect indicates 'in any manner and *at any stage of the process,' prior to* or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 128-129, emphasis in original.) The *Crittenden* court applied the federal standard announced in *Davis v. United States* (1994) 512 U.S. 452. In *Davis*, the Supreme Court concluded that the statement: "Maybe I should talk to a lawyer" was not a request for counsel. (512 U.S. at p. 462.) The *Davis* court declined to require law enforcement officers to cease questioning immediately if an individual made an ambiguous or equivocal reference to an attorney. (*Ibid.*) The *Crittenden* court also noted that the Supreme Court in *Davis* held that police may seek clarification of an individual's ambiguous reference to counsel, but are not required to do so. (9 Cal.4th at p. 130, fn. 7.)

We are satisfied on the record before us that Soto's reference to counsel was ambiguous and that the officers were not required to stop the questioning at that point. After the officers reaffirmed that Soto could choose to stop the interview until his counsel was present, Soto chose to continue talking. We find no violation of his rights requiring the suppression of his statements.

## II

Soto also argues the trial court erred in refusing his request to give the standard jury instructions on accomplice testimony (CALJIC Nos. 3.10-3.13, 3.16, 3.18-3.19). He takes the position that Manuel Rivera was an accomplice whose testimony was to be viewed with distrust by the jury. The prosecutor argued that Rivera was not an accomplice but an accessory after the fact. The trial court refused the proffered instructions.

"An accomplice is a person 'who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'



(§ 1111; *People v. Miranda* (1987) 44 Cal.3d 57, 99 [241 Cal.Rptr. 594, 744 P.2d 1127].) In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33). [Citation.] An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator's criminal purpose. (*Id.* at p. 194.) It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. (*Ibid.*; *People v. Beeman* (1984) 35 Cal.3d 547, 556-561 [199 Cal.Rptr. 60, 674 P.2d 1318].) [¶] Accomplice status is a question of fact for the jury unless the evidence permits only a single inference. [Citations.] Defendant must establish the accomplice status of a prosecution witness by a preponderance of the evidence. [Citation.]" (*People v. Sully* (1991) 53 Cal.3d 1195, 1227-1228.)

Section 32 defines accessories: "Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony."

Here, the evidence was that Rivera was among the group in the parking lot when Soto declared his intention to "jack" the truck and when the shooting occurred. After Soto and Alvarado returned to Rivera's house, Rivera helped hide the gun used by Soto. This evidence is insufficient to establish that Rivera was an accomplice. He was, instead, an accessory after the fact. The trial court did not err in refusing the accomplice instructions as to Rivera.

Soto also argues the trial court had a sua sponte duty to give accomplice instructions as to the testimony of Valerie Garcia. He argues: "The prosecution believed the robbery was intended in the main to secure appellants and others a 'ride,' i.e. the victim's truck, and Valerie Garcia herself said she spent most of the evening paging and calling her boyfriend Peter,

who was supposed to come and get her. . . . It was she who secured the victim's presence at the scene, by waving him down, to ask for spare change. . . . There was an inescapable inference that, either Rivera lied in saying Garcia was in a position to hear and see the robbery and robbery planning, or Garcia lied in saying that she was not. If Garcia lied, this wold [*sic*] be consciousness of guilt evidence that she too, intended to aid and abet a robbery, so she could finally get her ride home. This again raises an inference of accomplice status, which should have been placed before the jury."

Soto failed to establish that Garcia harbored the requisite intent to make her an accomplice, or even an accessory, to the murder. There is no evidence that she intended to lure Mr. Castaneda to Soto when she asked him for a dollar. She obtained the dollar from Mr. Castaneda before Soto made his statements about stealing the truck. The trial court was not required to give the accomplice instructions as to Garcia.

## III

Both Soto and Alvarado argue the prosecutor committed misconduct by waving a large black .357 magnum revolver in front of the jury as if it was the murder weapon, sine there was no evidence linking that weapon to the murder. Respondent argues that there was no error and that Soto's failure to timely object bars his argument on appeal.

During Rivera's testimony, the prosecutor showed him a gun and asked him if it looked familiar. Rivera said that it did, because "it looks like the gun that we hid." The prosecutor asked: "When you say the gun that you hid or 'we hid,' is this the gun that Paul Soto took from your house that you accompanied him along with Mike Alvarado?" Rivera said "Yes."

We agree with respondent that this testimony was sufficient identification of the gun to permit the prosecutor to ask other witnesses about the gun. The prosecutor later called Los Angeles County Sheriff's Sergeant Bruce Harris as an



expert witness who had examined the gun. Sergeant Harris testified that the gun was a double-action Smith and Wesson model 27 .357 Magnum revolver which required three and one-quarter pounds of pressure on the trigger to fire in the single action mode and twelve and one-half pounds of pressure to fire in the double action mode. Counsel for Soto did not object to this testimony.

At the close of the People's case-in-chief, counsel for Soto made his first objection to the introduction of the gun: "There's no linkage to this case. Appeared we have somebody who said that looks like the gun, that's it." The prosecutor conceded the point: "Mr. Bernstein's characterization, I believe, would be correct. Mr. Rivera was the only witness that testified, and I believe he stated that it appeared or looked like the gun he observed Mr. Soto having after the shooting. At this time, the People would withdraw People's 3 at this time . . . ."

After the People rested, counsel for Soto moved for a mistrial: "The jury has seen exhibit 3. It's been brandished extensively in court. . . . It's a large, black revolver. Looks at me at least a six-inch barrel. Overall length is a minimum of a foot. It's been displayed quite prominently. At this point, it has nothing to do with this case. I think it has to have some prejudicial effect . . . ." Counsel for Alvarado joined in the motion.

The trial court noted that there had ben testimony about a gunshot from a large caliber gun comparable to a .357 or a .38. The trial court denied the motions.

The trial court denied several efforts by the prosecutor to provide additional testimony about the gun. She was not allowed to question Desmond Pacheco, who had been in the group with appellants in the parking lot, about his statement regarding what happened to a gun. She was not allowed to question Alvarado about a Roland Macias, who apparently was arrested with gun marked as exhibit 3. After counsel for the defense objected, the trial court denied the prosecutor's attempt to call Pacheco as a rebuttal witness to testify that he and Macias had gone to Rivera's house, but found no one home.

The trial court also denied the prosecutor's effort to call a deputy sheriff to testify that Macias possessed the gun after the murder.

The prosecutor was allowed to question Alvarado about the gun Soto used in the murder. Alvarado was unable to identify the gun marked as exhibit 3 as the gun used in the murder or as the gun he helped hide in the park.

After the defense rested, the prosecutor moved to strike Sergeant Harris' testimony because of the trial court's rulings on the proposed rebuttal witnesses, and also asked that the jury be admonished not to consider that testimony. Counsel for Soto had no objection to this proposal. Counsel for Alvarado suggested a further admonition: "[T]he gun will not go into evidence. There's no evidence it was ever used in this crime. Therefore, that's why we are striking testimony. That exhibit will not be presented to them."

At the point, counsel for Soto renewed his motion for mistrial because the prosecutor had shown the gun to Alvarado on cross-examination, knowing that there was no link between the gun and the murder of Mr. Castaneda. Counsel for Soto agreed that Sergeant Harris' testimony should be stricken, but argued that the jury had heard a large amount of cumulative, irrelevant and prejudicial information. Counsel for Alvarado joined in the motion. The trial court denied the motion, observing, "On balance, I don't think it's that prejudicial. I don't think it was prejudicial at all, especially since I'm going to give a cautionary instruction."

At the beginning of the instructions to the jury, the trial court said: "You took notes in this case and took notes of each of the witnesses who testified. There's also reference made to exhibits coming in. Well, the gun that was People's exhibit 3, I believe, is not coming into evidence. That is not being admitted; therefore, the testimony of Detective Harris who took the stand, that testimony will be stricken by the court. [¶] It applied only to that particular gun so since the gun is out, the testimony has to got out also." There was no objection by counsel for appellants.



We find no error. "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citations.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1038.) We are satisfied that the order striking Sergeant Harris' testimony and the admonition to the jury were sufficient to avoid prejudice to appellants. If they found the admonition given to the jury unsatisfactory, it was their obligation to seek a further admonition.

## IV

Alvarado argues that his statements to the police should have been excluded. He contends that he was subjected to custodial interrogation without being advised of his *Miranda* rights, and that he did not waive these rights.

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve "the ultimate inquiry"; '[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." [Citations.] The first inquiry, all agree, is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a "mixed question of law and fact" . . . .' [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding "'basic, primary, or historical facts: facts 'in the sense of recital of external events and the credibility of their narrators . . . .'"" [Citation.] Having

determined the propriety of the court's findings under that standard, we independently decide whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402.)

In *Ochoa*, the defendant signed a statement that he voluntarily submitted to a polygraph examination. That fact weighed heavily in the Supreme Court's conclusion that he was not subjected to a custodial interrogation because a reasonable person under the same circumstances would have understood that he or she was free to leave. (19 Cal.4th at pp. 402-403.) The court distinguished a case cited here by Alvarado, *People v. Aguilera* (1996) 51 Cal.App.4th 1151, in which the Court of Appeal reversed a conviction because of a *Miranda* violation: "[I]n *Aguilera*, the court found that a reasonable individual would experience a degree of restraint 'normally associated with a formal arrest' (*Id.* at p. 1161) in part because the police, as the court emphasized with italics, told the defendant that "'[*w*]*e're not gonna let you leave* here until we go talk to the girl, and she's not gonna be able to confirm the story . . . .'" [Citations.] Nor does *Aguilera* say that the defendant in that case was given and signed a formal advisement that the questioning was voluntary–rather, an officer merely informed him that he was not in custody [citation]. Without either approving or disapproving *Aguilera's* compilation of circumstances that in its view tend to prove or disprove custody (*id.* at p. 1162), we find certain facts in that case notably unlike the facts of this one." (19 Cal.4th at p. 403.)

Here, the transcript of the interview of Alvarado by Detective Cheryl Comstock establishes that the detective had left word at Alvarado's house that she needed to speak with him. Detective Comstock also contacted Alvarado's mother at her work. Mrs. Alvarado told Detective Comstock that her husband was bringing Alvarado to the Pico Rivera Sheriff's station so he could be interviewed. Both Mr. and Mrs. Alvarado came to the Sheriff's station with their son. They had given permission to Detective Comstock to interview him.



Alvarado was not given a statement to sign to the effect that he had voluntarily participated in the interview, nor was he advised of his *Miranda* rights. The interview lasted approximately two hours, from 12:30 p.m. to 2:30 p.m.

During the first part of the interview, Alvarado gave an account of his activities on the night of the murder, but omitted any reference to the shooting or disposal of the gun. He admitted drinking. Detective Comstock said: "Okay, we did real good up until this point and everything you've said it's pretty accurate till [*sic*] this point, except for you left out the shooting." Alvarado asked: "The shooting?" Detective Comstock repeated: "Uh huh, the shooting." Alvarado said: "Well I had never seen no shooting." Detective Comstock responded: "Well I'm afraid you did." Alvarado repeated his statement that he had seen no shooting. Detective Comstock informed Alvarado that she had witnesses who said "quite the opposite."

She told Alvarado: "So why don't you take a big breath, like I told you before, the very best thing just to be honest. I don't have three notebooks full of notes because I haven't been talking to people and there's no way you could have this many people involved in something like that and people making deliveries did uh, the delivery trucks making deliveries, people sitting in donut shops doing things and your group and everybody is not going to lie about this, okay? You can't have that many people get involved in a murder and expect that some of them aren't going to tell the truth, okay? Now granted if it was maybe one person, you might be able to keep your fingers crossed and say, god I hope he doesn't tell the truth, but the problem is . . . that they have tell the truth, okay? Now all I'm simply doing is giving you the opportunity to tell the truth and when we got that many people telling a story and all of a sudden you tell something way far fetched different."

Alvarado said that he knew where the shooting occurred, but did not remember seeing it. Detective Comstock told him that she knew Alvarado had gone up to the passenger side of Mr. Castaneda's truck. She said: ". . . I don't think it was your

intention at all for that man to get killed. I think that was the last thing you thought was going to happen. When it did happen, it was like, oh shoot. I want to get out of here. As a matter of fact I'm so certain that you didn't want anything to happen when you went up to truck. You were kind of ducking behind the truck on that side, hiding 'cause you didn't really want to be up there, but you were. I think maybe you weren't thinking clearly. I think maybe you made some bad decisions 'cause you weren't thinking clearly that night and I know that's not what you intended to happen, by any means, 'cause you don't seem like that kind of a man."

Detective Comstock then questioned Alvarado about how much he had to drink and how impaired he was as a result. When Alvarado said that he had not seen what happened on the other side of the truck, Detective Comstock told him that he had to make some very tough decisions about being honest and taking care of himself, and that the people who shot Mr. Castaneda were not his friends because they had put him in a bad position. She emphasized that Alvarado did not owe anything to the shooter.

When Alvarado admitted that he had been at the truck, but refused to identify the shooter, Detective Comstock pressed him about the reason for his reluctance. Finally, Alvarado said it was because the shooter was from a gang different from his own. After some further discussion about the fact that this was not a gang shooting because the victim was not a member of a gang, Alvarado began giving further details of the crime, including his role in hiding the gun after the murder. Eventually, he identified Soto as the shooter.

Near the end of the interview, Detective Comstock commented, "You know I keep hearing your pager beep, do you need to use the phone or –" Alvarado interrupted and said no. Detective Comstock offered Alvarado the use of a telephone to make a call. Again, Alvarado said he did not need it. Detective Comstock said: "Okay. And we should be done here pretty quick. I'll get you out of here, so you can go about your activities." Shortly thereafter, Detective Comstock offered



Alvarado an opportunity to take a bathroom break or water break, but he said it was not necessary. Detective Comstock said: "Okay. If you do, just say so and we'll stop." A short time later the interview was concluded.

Detective Comstock took Alvarado out to his parents in the lobby of the station, advised them what had happened, and sent Alvarado home. In December 1995, the decision was made to charge Alvarado with the murder of Mr. Castaneda. Detective Comstock called his parents, told them a warrant had been issued for Alvarado's arrest, and arranged for them to turn him in at the station.

Alvarado relies heavily upon *People v. Aguilera, supra*, 51 Cal.App.4th 1151. It is distinguishable. In *Aguilera*, police officers went to the defendant's residence and told him and his mother that they wanted to interview him at the station. Both agreed to the interview. The defendant was taken to the police station by the officers. The interview, conducted in an interview room, lasted two hours. One officer told the defendant he was not in custody. But she then said they would take him home when they were finishing saying: "'[i]t really depends on how, how long you want to take and how, how quickly you tell us the truth.'" (*id.* at p. 1159.)

When the defendant denied involvement in the shooting, the officers rejected his version of events, accused him of fabricating an alibi with another suspect, told him not to "play games," confronted him repeatedly with incriminating evidence of his involvement with gangbangers, and falsely suggested they had his fingerprints from one of the cars involved in the incident. When the defendant maintained his innocence, the officers intensified their pressure, and "assailed him for hiding behind lies and not taking responsibility for his conduct." (*People v. Aguilera, supra,* 51 Cal.App.4th at p. 1159.) The defendant was warned that lies would not protect him and the truth might exculpate him. The officers also told him other police officers were with his mother, who would not corroborate his story, asked him to think about family events

and opportunities he would miss if sent to prison, and said he owed the victim the real story.

As the defendant persisted in his version of the events, the officers again strongly warned him of the negative consequences of lying to them. After further pressure from the officers, the defendant eventually partially abandoned his story. One of the officers told him: "'[Y]ou know [how] this is gonna work. You're gonna tell us some girl's name. *We're not gonna let you leave* here until we go talk to the girl, and she's not gonna be able to confirm the story, Joe.'" (*People v. Aguilera, supra*, 51 Cal.App.4th at p. 1160, emphasis in original.) At that point, the defendant dropped all resistance, explaining what had happened on the day of the shooting.

The *Aguilera* court concluded that the interrogation was custodial and that *Miranda* rights should have been given. It found significance in the officer's warning that the interview would end after he told the truth. Based on the officers' repeated rejections of the account given by the defendant, the *Aguilera* court concluded "a reasonable person eventually would have realized that telling the 'truth' meant admitting the officers' information was correct and explaining how and why one was involved and that until this 'truth' came out, he or she could not leave. The officers later expressly reinforced this implication by explicitly telling defendant he would *not* be allowed to leave if they had to go interview an alleged alibi witness." (51 Cal.App.4th at p. 1163.) The court also noted that the defendant was not told he was free to leave.

In reversing the conviction, the *Aguilera* court also emphasized that the "'tag team' interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how defendant's interrogation might have differed had he been under arrest." (51 Cal.App.4th at pp. 1164-1165.)



The interview of Alvarado was quite different. He was not told he could not leave until he told the truth, and was not subjected to the intense and aggressive tactics employed by the officers in *Aguilera*. Although the officers made it clear to Alvarado that they disbelieved his early, exculpatory, version of events on the night of the murder, they did not fabricate evidence or subject him to the intense pressure used by the officers in *Aguilera*. We are satisfied that a reasonable person under the circumstances in which Alvarado was questioned would have felt free to leave. The interrogation was not custodial and no *Miranda* warnings were required. The trial court did not err in admitting the statements Alvarado made during the interview.

## V

Alvarado argued there was insufficient evidence to support his conviction as an aider and abettor of the attempted robbery committed by Soto.

"When reviewing the sufficiency of the evidence underlying the conviction, our inquiry is limited whether any rational trier of fact could have found the necessary elements of the crime beyond a reasonable doubt. [Citation.] We review the record in its entirely when making that determination, viewing the evidence in the light most favorable to the prosecution. [Citations.] In other words, '. . . the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence–that is, evidence which is reasonable, credible, and for a solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] Thus, we "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citations.]" (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.)

The Supreme Court recently examined the principles establishing aider and abettor liability. In *People v. Mendoza* (1998) 18 Cal.4th 1114 the court said: "The actual perpetrator must have whatever mental state is required for each crime charged, here shooting at an inhabited building, murder, and attempted murder. An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' [Citations.] Once the necessary mental state is established, the aider and abettor is guilty not only of the intended, or target, offense, but also of any other crime the direct perpetrator actually commits that is a natural and probable consequence of the target offense. [Citation.]" (*Id.* at p. 1123.)

Alvarado testified at trial that he knew Soto wanted Mr. Castaneda's truck. The prosecutor asked: "You didn't know what you were thinking, but you went over there. And you had no intention of hurting him, but you walked over to the side of the truck also, correct?" Alvarado responded: "Yes." He was impeached with portions of his statement to Detective Comstock, which were played to the jury. Alvarado admitted telling Detective Comstock that he had heard Soto suggest taking the truck.

The jury also heard a portion of Alvarado's statement in which he said that Soto had asked who would go with him to get the truck and that Alvarado went to the passenger side and Soto to the driver's side. Alvarado admitted that he saw that Soto was armed with a gun before Soto walked toward the truck.

This evidence is sufficient to establish that Alvarado went to the truck with Soto with the intention of helping Soto to steal the truck.



## VI

Alvarado argues that his sentence is disproportionate to his level of culpability and must be reduced further to manslaughter. On his motion, the trial court reduced his conviction from first degree murder to second degree murder. But Alvarado contends that the trial court erred in concluding that it lacked the authority to reduce it further to manslaughter.

After his conviction, Alvarado moved to have his sentence reduced under *People v. Dillon* (1983) 34 Cal.3d 441. At the hearing on the motion, the trial court said that it was familiar with *Dillon* and its progeny, but could find no case allowing reduction from first degree murder to manslaughter. The prosecutor supported reduction of the offense to second degree murder. The trial court reduced the conviction to second degree murder.

In *Dillon*, the Supreme Court reduced a conviction for first degree felony murder to second degree murder because, in its view, the sentence for the former was excessive and a constituted cruel or unusual punishment. (34 Cal.3d at p. 489.) "Successful challenges based on proportionality are extremely rare. [Citation.] The defendant must show the sentence is '"out of all proportion to the offense"' and that it offends 'fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424 [105 Cal.Rptr. 217, 503 P.2 921], fn. omitted.)" (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

Here, the trial court did what the *Dillon* court did: it reduced the offense from first degree felony murder to second degree murder. Justice Mosk, writing for the *Dillon* majority said: "[B]ecause [Dillon] intentionally killed the victim without legally adequate provocation, defendant may and ought to be punished as a second degree murderer." (*Id.* at p. 489.) Unlike appellant, who was merely an aider and abettor, Dillon personally killed the victim. The Supreme Court found that Dillon acted with an intent to kill consistent with second degree murder, and reduced the offense accordingly.

Appellant argues that the trial court expressed a desire to further reduce his conviction and that it erred in concluding it had no discretion to do so.

The problem with appellant's argument is that his conduct did not constitute manslaughter. Manslaughter is defined in section 192 as "the unlawful killing of a human being without malice. It is of three kinds: [¶] (a) Voluntary–upon a sudden quarrel or heat of passion. [¶] (b) Involuntary–in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . ." In our case, as in *Dillon*, the evidence at trial established that there was no provocation for the homicide, making voluntary manslaughter inapplicable. The crime was not involuntary manslaughter because the homicide was not the result of a lawful act performed unlawfully or with criminal negligence, nor was it the product of an unlawful act not amounting to a felony. In sum, the evidence did not support a reduction to either form of manslaughter.

Neither was the crime second degree murder. The victim was killed during the attempted commission of a robbery. Under section 189, a murder in the attempted commission of a robbery is of the first degree. But appellant cannot be heard to complain over an error favorable to him. In *People v. Powell* (1949) 34 Cal.2d 196, the defendant was charged with performing an abortion on a patient which resulted in her death. That offense was second degree murder. The trial court, sitting without a jury, found Powell guilty of manslaughter. On appeal, Powell argued that the trial court did not have power to find him guilty of manslaughter, and that he was guilty of second degree murder or of no crime at all.

The Supreme Court disagreed: "It cannot be doubted that a trier of fact has and often exercises the *power*, because of obvious extralegal factors or for no apparent reason, to find a defendant guilty of a lesser degree or class of crime than that shown by the evidence. [¶] Furthermore, even if it be assumed that the trier of fact erred here when he found defendant guilty



only of manslaughter, defendant cannot invoke reversal on an error which is favorable to him. [Citations.] An appellant is precluded from complaining that he was convicted of a lesser offense than the one of which he is guilty according to undisputed evidence, . . . [Citations.]" (*Id.* at pp. 205-206, emphasis in original; emphasis in original; see also *People v. Lee* (1999) 20 Cal.4th 47, 64-65 [defendant cannot appeal error in conviction of voluntary manslaughter where evidence supports conviction of second degree murder].)

Under these circumstances, we conclude that the trial court was correct in ruling that it had no basis to further reduce appellant's conviction and sentence to manslaughter. We turn to Alvarado's argument that his sentence constitutes cruel or unusual punishment.

## VII

"To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' (*ibid.*), or, stated another way, that the punishment ""shocks the conscience and offends fundamental notions of human dignity"" [citation], the court must invalidate the sentence as unconstitutional." (*People v. Hines* (1997) 15 Cal.4th 997, 1078.)

Alvarado argues that the sentence of 15 years to life is disproportionate to what he describes as minimal involvement in the murder. He points out that he will have to serve a minimum of 12 years of this sentence before he is eligible for parole under section 2933.1. He also claims that his time in

prison will be particularly difficult, citing attacks he suffered while incarcerated in the Los Angeles County jail.

He contrasts his culpability with the defendants in a number of cases that upheld lengthy sentences for aiders and abettors in felony murders: *People v. Ortiz* (1997) 57 Cal.App.4th 480, *People v. Mora* (1995) 39 Cal.App.4th 607, *People v. Birden* (1986) 179 Cal.App.3d 1020, and others. While Alvarado may not have been as active a participant as those in the felony-murder cases he cites, he aided and abetted robbery-murder in this case. In what turned out to be a tragic mistake, Alvarado chose to accompany Soto, knowing that Soto intended to steal the truck and that he was armed with a gun. Alvarado went to the passenger side of the truck and stood there while Soto shot the victim. He then hid the murder weapon, and the following day, led Soto's friends to its hiding place so they could dispose of it.

The probation report reveals that Alvarado has had a drug problem since junior high school, using marijuana, LSD, and methamphetamine. He also drinks a six-pack of beer two to three days a week and drinks more on weekends. He is a member of the Pico Rivera Street gang, but the murder was not gang related. He had no prior criminal history as a juvenile. The trial court received numerous letters and the testimony of witnesses seeking leniency for Alvarado.

Soto, the shooter here, was given a sentence of life in prison without the possibility of parole. As we have discussed, Alvarado's conviction was reduced to second degree murder and he was given a sentence of 15 years to life. Under these circumstances, we cannot say that the punishment shocks the conscience and offends fundamental notions of human dignity.

## VIII

Finally, Alvarado argues the trial court erred in denying *Wheeler* motions challenging the prosecutor's peremptory challenges of three prospective jurors. Alvarado either joined



in Soto's *Wheeler* motion or made his own as to each juror in question.

"A party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. (*Wheeler, supra*, 22 Cal.3d at p. 276.) In *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69, 106 S.Ct. 1712], the United States Supreme Court held that peremptory challenges based solely on race also violated the federal equal protection clause when the defendant is a member of the race being challenged. Although *Batson* has no application in this case, the high court has recently extended the *Batson* holding and given a defendant, regardless of race, standing to object to the racially discriminatory use of peremptory challenges. (*Powers v. Ohio* (1991) [449 U.S. 400] [113 L.Ed.2d 411, 111 S.Ct. 1364].) Under *Wheeler*, of course, which is based on the right to trial by a representative jury, a defendant need not be a member of the group to challenge its exclusion. (*Wheeler, supra*, 22 Cal.3d at p. 281.)" (*People v. Fuentes* (1991) 54 Cal.3d 707, 713-714.)

The procedure for a *Wheeler* challenge is well established. "If a party believes an opponent is improperly using peremptory challenges for a discriminatory purpose, that party must make a timely objection and a prima facie showing that the jurors are being excluded on the basis of group bias. (*Wheeler, supra*, 22 Cal.3d at p. 280.) To establish a prima facie case, the moving party should first make as complete a record as possible; second, the moving party must establish that the persons excluded are members of a cognizable group; and third, the moving party must show a strong likelihood that the persons are being excluded because of group association. [Citations.] Once the moving party has established a prima facie case, the burden shifts to the other party to come forward with a race-neutral explanation related to the particular case to be tried. [Citations.]" (*People v. Fuentes, supra*, 54 Cal.3d at p. 714.)

We apply the substantial evidence standard in reviewing a trial court's ruling on a *Wheeler* motion. (*People v. Jones* (1998) 17 Cal.4th 279, 293.) If the trial court has not found a prima facie case of group bias, we review the entire record for evidence to support the trial court's ruling. (*People v. Buckley* (1997) 53 Cal.App.4th 658, 665, citing *People v. Howard* (1992) 1 Cal.4th 1132, 1155.) We affirm if the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*Ibid.*) We follow the Supreme Court's decision and accord the great deference to the trial court's ruling on *Wheeler* motions because the trial court's determinations largely turn on an evaluation of credibility. (*People v. Fuentes, supra*, 54 Cal.3d at p. 714.)

The first *Wheeler* motion came when the prosecutor had exercised a peremptory challenge to excuse prospective juror number 3492.[3] PJ 3492 had no prior jury experience, was married to a "plant lady" and had children who worked for his wife. He was a cabinet maker, and had a daughter who was a secretary to a church. He was Hispanic. When asked if he felt comfortable with this being his first case as a juror, PJ 3492 replied "No."

The motion made by counsel for Soto, joined by counsel for Alvarado. Counsel for Soto said: "The last juror that was excused is Hispanic in origin, as is my client. My notes indicate no justifiable reason, a side [*sic*] from his racial origin, that I'm aware of for his excusal." The prosecutor replied that the fact that Soto is Hispanic was not significant because the victim was also Hispanic. The trial court observed that most prospective jurors in the courthouse are Hispanic. The prosecutor said that PJ 3492 "was sleeping at one point, had his eyes closed while the judge was going through some of the questions." The trial court said it did not find a prima facie case and denied the motion.

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3. We refer to prospective juror by their number, for example, PJ 3492.



Alvarado argues the trial court failed to evaluate the reasons given by the prosecutor for exercising her peremptory challenges. But defense counsel failed to offer any evidence showing a strong likelihood that PJ 3492 was excluded because he was Hispanic, other than the bare assertion that this was the case. This is insufficient to establish a prima facie case. (See *People v. Buckley, supra*, 53 Cal.App.4th at pp. 665-666.) Even if we were to find a prima facie case was made, the fact that the prosecutor believed the juror to be sleeping during voir dire was a sufficient race neutral ground for challenging him.

The second *Wheeler* motion was made after the prosecutor exercised her peremptory challenges to excuse two additional Hispanic prospective jurors: PJ 6300 and PJ 4379. Counsel for Soto, joined by counsel for Alvarado, asserted that there was a pattern of excusing Hispanic jurors and that there was no other rationale to justify excusing them. The court and counsel agreed that the prosecutor had exercised two-thirds of her challenges on Hispanic prospective jurors.

The trial judge said that he was trying to determine whether a prima facie case had been made. He asked if the prosecutor wished to respond. She said that PJ 6300 was unable to recall the employment status of one of her five adult children. The prosecutor explained: "My concern is her ability to remember basic things. Part of the whole process of a jury trial is to listen and recall the evidence and be able to deliberate in a reasonable manner. My concern is she would not be able to do it."

With respect to PJ 4379, the prosecutor said: "Regarding the preemptory [*sic*] with regards to 4379 seated as juror 12, she had no prior jury experience. What the people are concerned about is this morning, in particular, she seemed to be looking over at -- staring more at the defendants and defense side of table. She never made eye contact with the People. [¶] Based on her body language, the fact she has no prior jury service, watching her looking at the defendants, more in the direction of the defendants, the People made, in its discretion, the choice to excuse her." After defense counsel pointed out that there were

only two Hispanics on the panel and none left in the pool of prospective jurors, the trial court found no prima facie case had been made and denied the motion.

Again, the trial court was justified in concluding defense counsel had failed to make a prima facie case. Moreover, PJ 6300's memory problem and PJ 4379's demeanor were race neutral grounds to excuse them.

Counsel for Alvarado made a third *Wheeler* motion when the prosecutor removed the only two African American prospective jurors in the pool, PJ 5995 and PJ 0936. Without expressly finding that a prima facie case had not been shown, the court asked the prosecutor to respond. The prosecutor said that she excused PJ 5595 because her ex-spouse was a Los Angles police officer and that they had been divorced only one year. The prosecutor said that she would be calling law enforcement officers in her case. With respect to PJ 0836, the prosecutor said that she was excused because she had prior jury service on a jury which was unable to reach a verdict on a weapons charge where the weapon at issue was never found. The court did not indicate whether it had found a prima facie case, but denied the motion.

Assuming that a prima facie case was found (*People v. Arias* (1996) 13 Cal.4th 92, 135), we are satisfied that the reasons given by the prosecutor for excusing PJ 5995 and PJ 0836 were sufficient. We find no error.

**DISPOSITION**

The judgments of conviction are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

EPSTEIN, J.

We concur:

VOGEL (C.S.), P.J.
CURRY, J.